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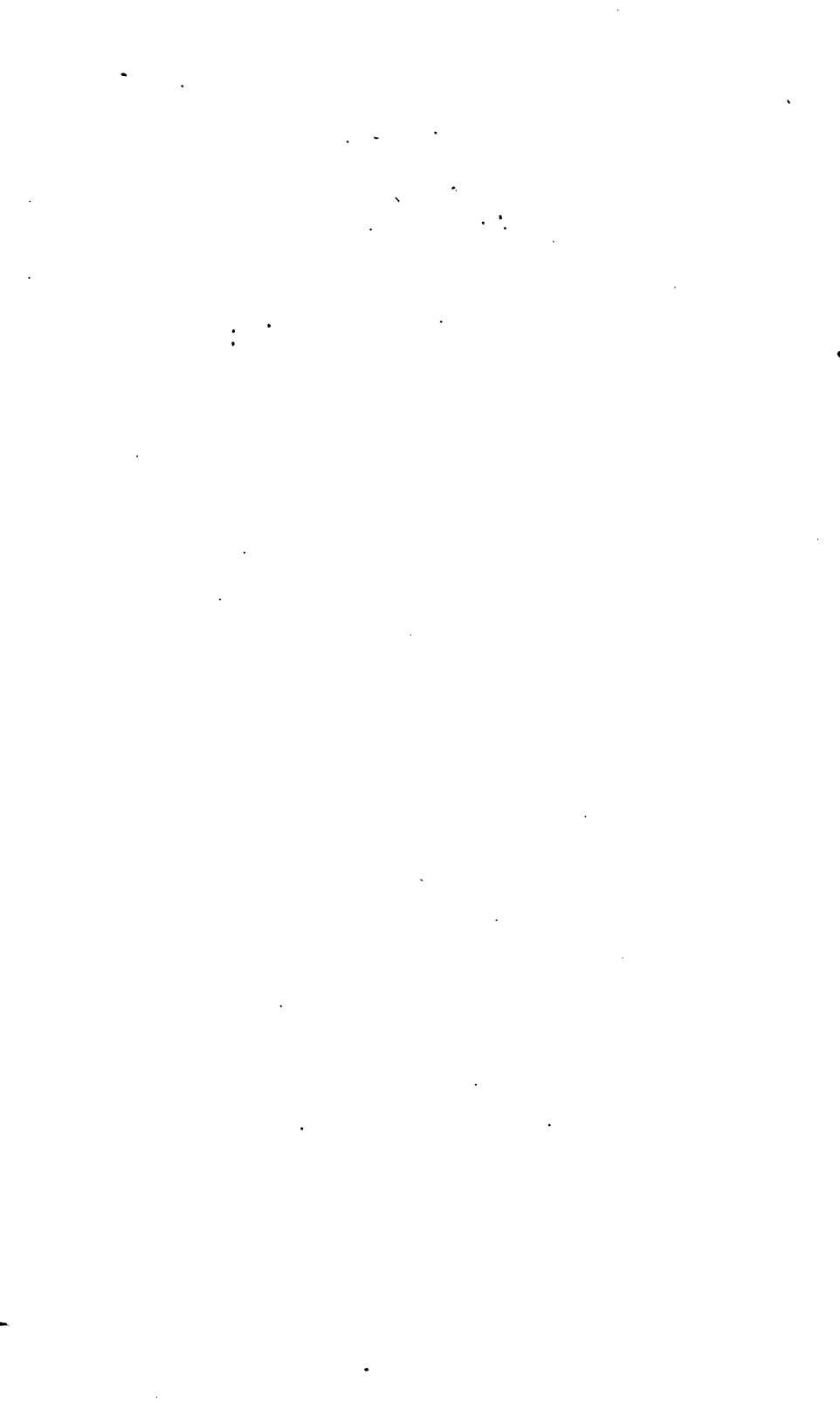
A TREATISE
ON
The Law
RELATING TO
HIGHWAYS;
COMPREHENDING
TURNPIKE ROADS, PUBLIC BRIDGES,
AND
PUBLIC FOOTPATHS;
IN WHICH THE PROVISIONS OF THE SEVERAL
HIGHWAY AND TURNPIKE ACTS
ARE CAREFULLY ARRANGED
ACCORDING TO THE SUBJECT-MATTER.

TO WHICH IS ADDED
AN APPENDIX OF FORMS AND PRECEDENTS.

BY
ROBERT WELLBELOVED, Esq.
OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

SAMUEL BROOKE,
LAW PRINTING-OFFICE,
35,
PATERNOSTER-ROW, LONDON.

1829.



TO

THE RIGHT HONORABLE

LORD TENTERDEN,

LORD CHIEF JUSTICE OF ENGLAND,

&c. &c. &c.

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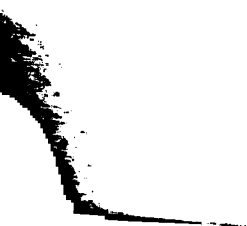
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PREFACE.

It is believed, that this is the first attempt, which has been made, to bring under one view the whole of the law respecting public ways, and to reduce into one continuous system its various principles. And perhaps a more favorable period for such an effort could not be assigned. Many decisions have lately been pronounced by the Courts upon this subject; and though there are several *dicta* which it is difficult to reconcile with other authorities or with principle, yet in scarcely a single instance have they received the sanction of the whole Court. It is, therefore, desirable to point out these few incongruities, before they acquire additional weight by being confirmed in future cases; and thus to preserve, as much as may be, the general consistency of this department of the law.—Another motive for entering upon this task at the present moment, arises from the expectation, which may very reasonably be entertained, that the Legislature have, for a time,

concluded their labours in amending and adding to the laws relating to highways and turnpike roads; and that the Acts now in force will be permitted to operate without any early alteration. There is nothing more to be dreaded, than a perpetual change in the enactments relating to any branch of law. In such a state of innovation, the provisions of the Legislature can never be properly executed, as they can never be thoroughly and generally known. And there is great danger of the occurrence of this fluctuation, when they who propose the laws, also concur in putting them into execution. Small omissions or errors are made the occasions of new Acts of Parliament, when the common sense of mankind would be amply sufficient for their correction.

In the following pages I have laboured to shew distinctly the line of demarcation between the Common and the Statute-law; aiming, at the same time, to point out how they assist and depend upon one another. The Common-law relating to Highways is no where repealed. It exists in its full extent, and forms a most important ground-work for the provisions of the Legislature. Without a knowledge of the former, an acquaintance with the latter will infallibly lead to error; for, in point of fact, the most material parts of the law upon this subject (I might say all its

principles) are derived from the *lex non scripta*. The Acts of Parliament, both Highway and Turnpike, are only accumulative. In many respects they are merely declaratory of the Common-law, and in a great measure the penalties imposed by them are additional to, but do not annul those to which the offenders were previously liable. And it may not unfrequently happen, that the original process by indictment will be preferable to the summary proceeding provided for by Statute. To be possessed therefore of the Acts of Parliament alone (however carefully arranged, either alphabetically or according to the subject-matter) is to purchase the assistance of a guide who is himself in ignorance of the way, and who cannot fail to mislead. The Statutes must be illustrated by the Common-law, while the deficiencies in the latter are supplied by the former.

It may here be remarked, with regard to the diversion and extinction of highways, that it is a prevalent opinion, that the powers for this purpose, which are granted to Justices of the Peace, are so given, to be exercised for the benefit of the proprietor, and not of the public. And this position has, in an especial degree, been reduced to practice in the instance of footpaths. The supposition, however, is very far from being warranted by the wording of the Act, and it is utterly untenable, when we refer to the common law.

Under that system no distinction can be found between footpaths and carriage-roads: the right of the public is of exactly the same quality over the one as over the other; and it ought to receive the same support in both instances. It is frequently asserted, that footpaths are very injurious to the property over which they pass. This I deny, if it be meant, that they are injurious to the *quantum* of property vested in the owner. The soil is not so valuable as it otherwise would be; but it is as productive as it ever has been to the proprietor; and it was with reference to its present capability that he purchased the estate. Every right of way is a public easement, which must have been acquired with the consent of the owner of the soil. This consent is presumed, where the public have had a prescriptive possession; it is implied, where the possession has been permissive; and sometimes it is voluntarily and openly given by the owner. It must be supposed that an equivalent has been received for the grant made to the public, either in the improved value of the land, or otherwise. But whether that be the case or not,—whether he freely consented, or the public obtained their privilege through his neglect,—there is no reason why that privilege should be recalled by him, who has permitted its acquisition. In almost every instance, the closing a public way for the benefit of the proprietor is an absolute gift, without consider-

ation, to an individual out of the possessions of the public. The Legislature has invested Justices with large powers, and they are bound to remember that these powers are to be exercised magisterially. They ought never to grant their assistance as matter of favor. The Act expressly declares, that the alteration thereby authorized, is to be made only *when the change will be more beneficial to the public*: they who know how its provisions have been carried into execution, can best tell the use which the Magistracy have made of their authority. But every Magistrate, as he is an honest administrator of justice, will remember that he is in the execution of a duty, and that he is expected to perform that duty with an exclusive regard to those rights which are entrusted to his care.

It may at first sight appear that I have been too minute in the discussion of the question as to the nuisance in obstructing a navigable river, which will be found in the last Chapter. But it will be seen, upon reflection, that the principle involved is nothing less than the very definition of nuisance in highways in general; and that the application of it to that particular case is one of great importance.

I have been at great pains in my arrangement of the several Legislative provisions, and I have

given the enactments at length, in order to make this Treatise in itself a practical compendium of the whole of the law upon the subject, and a safe guide, wherever the Statute Book may not be accessible. With the same object, I have endeavoured to place the decisions of the Courts in so clear a light, that they may regulate the proceedings in future cases.

R. W.

4, *Essex Court*,
Michaelmas Term, 1828.

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ADDENDA ET CORRIGENDA.

PAGE	LINE	
28, note (b),		Add " And see Doe d. Pring v. Pearsey, 7 B. & C. 304."
215, 18,		For "proceedings," substitute "action or actions."
20,		Add " And by Stat. 7 Geo. 4. c. 64. s. 17, In any such indictment or information, it shall be sufficient to state any such property to belong to the trustees, and it shall not be necessary to specify the names of such trustees. See post, p. 541."
345, 4 & 5,		Dele "or indictment."
6, }		Add " But by Stat. 7 Geo. 4. c. 64. s. 15, In any indict- ment or information, it shall be sufficient to state any such property to belong to the inhabitants of the county, riding, or division, and it shall not be necessary to specify the names of any such inhabitants."
353, 15, }		

The Law

RELATING TO

HIGHWAYS.

CHAPTER I.

ON THE NATURE AND QUALITIES OF A HIGHWAY.

THE object of this Chapter will be to prove that the proper definition of a Highway is, "Any thoroughfare which is open to all the king's subjects;" and, in order to accomplish this end, two points must be established; 1st, That there is no distinction, in this respect, between a carriage road, a horse road, or a mere foot-path, each of which is equally considered by the common law as capable of being a highway; and 2dly, That there can be no highway where there is no thoroughfare.

FIRST.—All ways, whether foot, horse, or carriage-ways, *may* be highways.

And here it is worthy of notice, how the original title of the public to passage along a highway must have arisen, in order to see that no distinction, such as that which has been attempted to be drawn between carriage roads and mere foot and horse paths, is deducible from the mode in which the public first acquired their right. It seems evident that a public right of way of every de-

Queen's Highway, or the *Highway*. So a bridge may be a common highway (*a*). And a river that is common to all the king's subjects, has in several cases been held to be a highway; and it has been determined, that if the course of a river change, that river being a highway, the highway itself is diverted into the new channel (*b*); a privilege which the law allows of only in the case of public ways: for in regard to private ways, if the path become impassable, the owner of the right of way is not at liberty to pass over the adjoining land; which he might have done, had it been a public way; as we shall see in the course of the following pages.

In *Rex v. Inhabitants of Limehouse* (*c*), where a presentment was made at a court leet, for not repairing a *certain pair of stairs* leading to the Thames, several exceptions were taken to the form and manner of presentment, but the Court would not quash it, because it was for not repairing the *Highway*: and therefore the proper mode of action had been pursued for enforcing the repair thereof. Thus also in *Thrower's case* (*d*) an indictment was laid against the party for stepping up a common footpath. Now the remedy by indictment, or presentment in the Leet, is peculiar to highways, and cannot be had recourse to in the case of a private way, for any obstruction of which the proper proceeding is by action on the case. Nor will either mode of proceeding be permitted in the case to which it is not appropriate (*e*). And the instances are numerous, in which indictments have been laid for not repairing a highway, where the *locus*

(*a*) 2 Ld. Raym. 1174; and see Salk. 359, pl. 8. and 6 Mod. 255.

(*b*) 22 Ass. 93.—Roll. Ab. 390. 1 Ld. Raym. 725. and *Rex v. Hammond*, 10 Mod. 382.

(*c*) 2 Show. 455, pl. 413.

(*d*) 1 Ventr. 308.

(*e*) See post, and also *Regina v. Inhabitants of Cluworth*, Salk. 358, pl. 6.

in quo has been a footway. And there are many cases throughout the Reports, in which public footways are pleaded as highways, without any demurrer being ever made to such a mode of pleading. I shall content myself with mentioning one of the latest cases of the kind which I have noticed, and that is the case of *Logan v. Burton* (a).

From all these decisions it may be pretty clearly deduced, that the term "Highway" extends to *all* public ways. And this doctrine is fully confirmed by the modern case of *Allen v. Ormond* (b), in which the plaintiff brought an action against the defendant for obstructing his private right of way over a certain close, "unto and into a certain public king's highway in the parish aforesaid, and so back again." It appeared that this public highway was a footway; and it was objected, that the *terminus ad quem* described in the pleadings, being a public highway, which is *nomen generalissimum* and must be taken to be a highway for all purposes, was not proved by evidence of a common footway only. This and other objections being over-ruled at the trial, were again urged upon a motion for a new trial. But *The Court* said, "They held the *terminus ad quem* laid to be well enough proved by evidence of a public footway; for it was a public highway for foot passengers; though such a description might be bad upon special demurrer, as not pointing out with sufficient certainty what sort of highway was meant."

And a similar opinion is delivered by Lord Ellenborough, in the case of *Rex v. The Inhabitants of the County of Salop* (c), where his Lordship observes,

(a) 5 Barn. & C. 513.

(b) 8 East, 4.

(c) 13 East, 95.

“ There is no doubt that a public footway or bridleway is a highway; it is a highway for foot passengers, or for horse passengers; and the parish is bound to repair it, till they can throw the *onus* upon others. So all public bridges are *primâ facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can shew that others are bound to repair particular bridges.”

SECONDLY.—Having endeavoured to shew, that each of the three kinds of way mentioned by Lord Coke is equally distinguishable into a public way (or highway) and a private way, I shall proceed to consider, what is such a public way as comes under the legal definition and acquires the privileges of a highway; and thereby to prove, that there can be no highway where there is no thoroughfare.

It seems to have been at one time held, that no way was a highway which did not lead to a market-town: but the law appears to be now settled, that any way which is common to all the king's people, to be *traversed* by them, is a highway. For there were highways before there were market-towns; and if it were essential to the constituting a highway, that it should expressly lead to a market-town, then it would follow, that the lord of a market, by forfeiting or surrendering his charter, might cause that to cease to be a highway which was a highway before; or the king, by granting a market in any place where there was no market before, might thereby consequently change the way to it from a private way into a highway(*a*). It therefore seemeth, says Mr. Hawkins, that every way which is common to all the king's people,

(*a*) See 1 Hawk. P. C. c. 76, s. 1.

whether it lead directly to a market-town, or only from town to town, and does not terminate there, but is also a *thoroughfare* to other towns, may properly be called a highway. The better opinion seems to be, that the way ought to be a *thoroughfare*, and not merely a passage to some spot, which, having reached, it is necessary to return by the same path to obtain the common road. Yet we shall see that this doctrine has been controverted by high authority.

In support of the position, that to constitute a highway it is not necessary that it should lead to a market-town, we have the weighty authority of Lord Hale, who, in *Austin's case* (a), observed, "If a way lead to a market, and were a way for all travellers, and did communicate with a great road, it is an highway; but if it lead only to a church, to a private house or village, or to fields, there 'tis a private way. But it is matter of fact, and much depends upon common reputation."—Here it is evident that his Lordship rested his distinction between public and private ways, upon a very different ground, than that of the leading or not leading to a market-town. And the observations of the same learned Judge, in *Thrower's case* (b), are still clearer upon this point. In that case, the defendant was indicted for stopping *communem viam pedestrem ad ecclesiam de Wisby*. It was objected that an indictment could not lie for a church-path; besides the damage, it was said, is private, and concerns only the parishioners. But Lord Hale said, "If this were alleged to be *communis via pedestris ad ecclesiam pro parochianis*, the indictment would not be good; for then the nuisance would extend no further

(a) 1 Ventr. 189.

(b) 1 Ventr. 208.

than the parishioners, for which they have their particular suits; but for aught appears, this is a common footway, and the church is only the *terminus ad quem*, and it may *lead farther*, the church being expressed only to ascertain it; it is laid *ad commune nocumentum*." Here is no allusion to any necessity that the way should lead to a market-town; but the reason given is, that the way in dispute was a common footpath, *which might lead farther*; that is, that it must be presumed to be a thoroughfare, and *therefore* a highway.

That any way which is open to all the public to pass *through* it, or, in other words, a thoroughfare, is a highway, is expressly decided by Lord Ellenborough, in a late case at Nisi Prius; where an indictment was brought for obstructing a passage, which led from one part of a street, by a circuitous route, to another point in the same street, and which had been open to the public as far back as could be remembered; and though it could be, in general, of no use to those walking up and down the street, being a most circuitous route which no one would willingly take, yet it was convenient for the public, when the street was blocked up by a crowd. And his Lordship held that this was a highway, for removing the obstruction of which it was proper to proceed by indictment(a).

It may be safely laid down as deducible from all these cases, that any thoroughfare which is open to all the king's subjects, is by the common law considered as a highway. Nor do I know of any modern case in which this doctrine has been denied. But, on the contrary, it has been extended; and that, as it appears to me, without sufficient consideration, and by no means in con-

(a) Rex v. Lloyd, 1 Campb. 260.

formity with the principles of the law upon the subject. In two recent decisions the Court have declared it to be their opinion, that it is not necessary for a highway to be even a thoroughfare. I shall briefly state these cases, and then proceed to examine the reasons upon which they were decided.

In *Rex v. Lloyd*, before cited, Lord Ellenborough said, " I think, that if places are lighted by public bodies, " this is strong evidence of the public having a right of " way over them; and to say that this right cannot exist " because a particular place does not lead conveniently " from one street to another, would go to extinguish all " highways, where, (as in Queen Square) there is no " thoroughfare." In this *dictum* of his Lordship's, for it is nothing more, as the way there in dispute was a thoroughfare, he takes for granted the very point at issue, when he says, that Queen Square and such places, are highways. Yet I have been unable to find a single case in the old books in favor of such a position; and among the modern Reports I find only one decision that supports it. I allude to the case of *The Rugby Charity v. Merryweather* (a). This was an action of *trespass*, brought by the trustees of the Rugby Charity against the defendant at the Sittings in Middlesex, in May 1790, to try a right of way in dispute between the plaintiffs, and the Governors of the Foundling Hospital. There were several pleas of justification on the record; amongst others one, stating that the *locus in quo* (which was Lamb's Conduit Street) was a common highway, and that the supposed trespass was committed in removing an obstruction there. It appeared in evidence, that the right of the soil was clearly in the plaintiffs; but there had

(a) 11 East, 375 (note).

been a common street there, though no thoroughfare, by reason of the houses at the end (a), for above fifty years. The plaintiffs accounted for not having put up a bar or the like, to denote that the way was not relinquished to the public at large, by shewing that the *locus in quo* had been in lease for a long term up to 1780. Lord Kenyon, who presided at the trial, asked what the plaintiffs had to say to the time from 1780, till about two years ago, when they had put up a bar. In answer it was said, that they had been in treaty with the Governors of the Foundling Hospital respecting the allowing them a right of way, which treaty was finally broken off. Lord Kenyon, in addressing the jury, said, " If this rested
 " solely on the ground of a question of right between
 " the plaintiffs and the Foundling Hospital, the former
 " would certainly not have been barred by the time which
 " elapsed from 1780 till the obstruction was put up,
 " pending the treaty between them; but during all that
 " time they permitted the public at large to have the free
 " use of this way, without any impediment whatever, and
 " therefore it is now too late to assert the right; for this
 " is quite a sufficient time for presuming a dereliction
 " of the way to the public. In a great case, which was
 " much contested, six years was held sufficient. *And as*
 " *to this not being a thoroughfare that can make no*
 " *difference.* If it were otherwise in such a great town
 " as this, it would be a trap to make people trespassers.
 " The Duke of Bedford preserves his right in South-
 " ampton Street, Covent Garden (b), by a bar set across

(a) In *Woodyer v. Hadden*, 5 Taunt. 138, Chambre, J. observed, " That there is a slight error in this Report, in stating that it was no thoroughfare, by reason that houses were built across at the end; I have the briefs on both sides, and was in the cause." But

at any rate there was no thoroughfare on account of the land at the end of the *locus in quo* being private property.

(b) This street, however, is a thoroughfare. It is not customary to erect bars across ways, which are no thoroughfare.

“ the street, which is shut at pleasure, and shews the “ limited right of the public.” And the jury accordingly found a verdict for the defendant upon the issue, on the plea of a common highway.

It is evident that Lord Kenyon, in the above observations, and also Lord Ellenborough, in the case of *Rex v. Lloyd*, were misled by paying too much attention to the particular instance of the streets in so large a town as London, and overlooking the requisites and legal distinctions attached to highways in general. The parishes in London are, I believe, without exception, paved, lighted, and watched, under the regulation of divers Acts of Parliament; and are thereby completely withdrawn from the rule of the common law: and it is therefore incorrect, and contrary to all sound reasoning, to extract the qualities of highways in general from the partial instance of the streets of the metropolis; yet, with all deference to these great Judges, this is the source from whence their arguments are derived.

As to the point whether, in the case of *The Rugby Charity v. Merryweather*, there was sufficient evidence of a dereliction of the way to the public, I must refer to that part of this treatise which relates particularly to that branch of the subject. But, independently of any such consideration, it may well be doubted, whether, under any circumstances, the doctrine of dedication can be applied to a way along which there is no thoroughfare. By that doctrine, if the public at large have for a length of time been permitted the use of a way, without any obstruction on the part of the owner of the soil, it is to be presumed in law, that he, by his acquiescence, has assented to such way becoming a public one. This permission is considered as evidence of the abandonment of his rights

in favor of the public. But it must be remembered, that the actual enjoyment of the way by the public is, in point of fact, the foundation of their title to it. Now it requires some ingenuity, and no little exercise of the imagination to conceive, that the public at large have been in the possession of a way, which could never be of the least benefit to them. If the *locus in quo* be open only at one end, is it reasonable to suppose, that for a length of time the public have been accustomed to go along it, with no other object than to return the same way by which they went? Or is it not more probable (especially if the place be a street) that it has been used only by such individuals as have been occupiers of the contiguous property? To infer any other dereliction than that of a right of way to the inhabitants of the houses in the street, is to lose sight of every principle upon which the doctrine of dedication is founded. The very fact of one end of the way being inclosed ought to be considered as sufficient evidence, that there is no intention to dedicate the way to the public use. It is admitted, that if the owner place a bar, or merely a line of thread, *across that end of the street which is already inclosed* (a), it would be effectual to preserve his right. If so, it is difficult to assign a reason why the inclosure itself should not answer the same purpose.

Lord Kenyon argues, and this is the principal reason which he gives for his opinion, that unless such a way were held to be a public way, the opening it would be a trap for trespassers (b). This I cannot admit. Allowing,

(a) See 5 Taunt. 135.

(b) An *occupation* road is so common a thing in every part of the kingdom, that it is wonderful Lord Kenyon should ever have made this observation, and have been echoed

in it by Mr. Justice Chambre, in *Woodyer v. Hadden*. It is an overpowering fact, that there is no instance of *trespass* being ever brought, for passing along such a way.

however, that it were so, it is equally setting a trap for trespassers, where a bar or line of thread is drawn across the *inclosed* end of the street; and yet this has not been considered a sufficient reason for declaring, in such a case, that the way is a highway. But it is not easy to prove how an action of trespass could be maintained in the case put by Lord Kenyon; for it scarcely admits of a doubt, that, on account of the way being open, and so inviting persons to go along it, there would be quite sufficient foundation to support a *plea of licence*; as was observed by Lord C. J. Mansfield, in the case of *Wood- yer v. Hadden*; which will presently be noticed. And that such a plea would be allowed is confirmed by an observation of Holroyd J., in the case of *Marquis of Stafford v. Coyney* (a), where he says, "Perhaps, indeed, an user of the way beyond the restricted right might not make an innocent party a trespasser, *for the sufferance of such more extensive use would be evidence of licence.*" (b) After notice, indeed, a person would be a trespasser. And it may be observed, that this privilege of warning people off, which Lord Kenyon's decision would take away, while it presents no trap for trespassers, is highly beneficial to the inhabitants in the street, whose interests, according to Lord C. J. Mansfield, ought to be attended to.

Let us proceed shortly to consider what would be the effect produced, by establishing, as correct law, the decision of Lord Kenyon, that a place which is no thoroughfare can be a highway, and liable to the rights and remedies applicable thereto. For the best test by which any opinion can be tried, is to see whether the *conse-*

(a) 7 B. & C. 261.

(b) And see *Cro. Car.* 267. and *Yelv.* 141, 142.

quences which flow from it are accordant with legal principles, and supported by authority. What, then, would be the consequences in the present case?

The first and most obvious is, that every such way must be maintained and kept in repair at the expence of the parish, although, by reason of its being no thoroughfare, it can be of benefit only to a very limited portion of the inhabitants of the parish. For, as we shall see in a future part of this treatise, the parish is *primâ facie* liable to the repair of all the highways within its limits. Very probably this circumstance did not occur to Lord Kenyon, when he decided the case now under discussion, as there the *locus in quo* was a street, the repair of which was regulated by the provisions of an Act of Parliament: and he deduced the general rule from the particular instance, and substituted the exception for the principle. If that decision be correct, every road leading only to a village or to common fields (though expressly called private ways by Lord Hale), and every little court or alley in a town being no thoroughfare, but across which the owner may have omitted to place a bar, either through neglect or design, must be the source of a heavy burthen upon the parish; and the inhabitants would be liable to be indicted whenever any of these private ways was out of repair. Did we not recollect that the question of repair could not affect the case then before Lord Kenyon, or the streets of London in general, a local acquaintance with which seems to have had great weight in its decision, it would appear wonderful how a conclusion so obvious could fail to strike the vigilant mind of that learned Judge, or could escape the attention of the Bar, who, we are told, were well satisfied with the verdict. We may say, therefore, that a party most materially affected by the judgment, to wit, the parish, was not before the Court.

Another consequence, which would result from the doctrine now under discussion is, that great uncertainty would be produced as to the mode of action proper to be pursued for removing any obstruction to the right of way. The law has, for this purpose, made a distinction between highways and private ways; and has laid down a clear rule, that for any nuisance committed on a highway, the only remedy is by indictment, or presentment in the Leet, but if the *locus in quo* be only a private way the party annoyed must resort to his individual action upon the case. The object of this distinction is, in order to avoid such a multiplicity of suits as would arise, were it permitted to any individual to proceed separately for remedying the public grievance. To this rule, therefore, there is no exception; and the one mode of action can never be substituted for the other. But if we submit to Lord Kenyon's decision, it will be impossible to distinguish between public and private ways. The quality of every way must be ascertained by the verdict of a jury: and until the verdict was had, no certain opinion could be given as to the form of action by which it should be sought. We have the authority of Lord Hale (a) that if a mere *church-path* be out of repair, the proper remedy is by action, and not by indictment; and yet how much more extensive is the use by the public of such a way, than that of a street which is no thoroughfare. A way which leads out of a high road to a village, and terminates there, appears to be equally open to be traversed by the public as such a street; yet the same great authority declares, that the former is not a highway.

Another consequence which peculiarly affected the case before Lord Kenyon, and which may be mentioned as

(a) 1 Vent. 308.

being corroborative of our argument, is the destruction, without sufficient cause, of private property. A right of way, especially in a town, is a valuable easement annexed to the soil; and the profit arising from the sale of it was lost to the Rugby Charity by the decision in that cause. And in the case of *Woodyer v. Hadden*, the defendant endeavoured to obtain, upon similar terms, a passage to his own property, which would have greatly improved its value, under the plea, indeed, of a public right; he was not, however, so successful as the Foundling Hospital had been.

It may appear presumptuous to contradict any thing, which is supported by the great name of Lord Kenyon; but this presumption will be diminished when we consider, that several learned Judges have expressed doubts as to the correctness of his Lordship's opinion.

I have stated that the interest of the tenants residing in the street ought to be considered, with regard to this question. Lord C. J. Mansfield, in *Woodyer v. Hadden* (a), observes, "It is insinuated that this was an attempt of the plaintiffs, to extort a sum of money for passing over this way; but I think the plaintiffs would not act handsomely, if legally, if, for any price, *without the consent of the tenants*, the inhabitants of these houses, they should agree to its becoming a public way; for there are many conveniences attending a private *cul-de-sac*, of which, having so let it to them, the lessors have no right to deprive them."

The decision in this case is opposed to that of the Rugby Charity. The facts are as follows:—The plaintiffs

(a) 5 Taunt. 125.

had built a street, abutting at one end on a public street, and at the other end, on the defendant's land, on which a fence was erected between the two ownerships: but afterwards the defendant, wishing to obtain the use of the street as a way, pulled down his fence, whereupon the plaintiffs erected a fence of their own, upon their side of the division between the different properties. This fence the defendant destroyed, claiming a right of way; and for that the plaintiffs brought their private action. Three Judges, against one, gave judgment for the plaintiffs, on the ground that there was not sufficient evidence of a dedication to the public; and each of those three Judges expressed a doubt as to the correctness of Lord Kenyon's decision upon the subject of the thoroughfare. Gibbs, J. observed, "There can be no doubt, that if a man had erected a rail at the extremity of his land *against the land of another*, he might thereby restrain others from passing; if he had drawn a thread there it would have done; why it should be necessary to put a rail or any thing there at all, is what I cannot understand." Heath, J. is still stronger in his strictures upon Lord Kenyon's judgment. "Is," he asks, "A Nisi Prius decision to overturn an ancient established law of the land?" and he adds, "The ancient form of an indictment always shewed both the *termini* of a public highway, and the reason was, that if the way did not lead from town to town it was not a highway. How then can a street like this, *which is no thoroughfare*, be deemed a public highway?" and Mansfield, C. J. said, "No one can respect Lord Kenyon more than I do, but I always thought, as to the Rugby Case, there was reason to doubt that."

In the still later case of *Wood v. Veal* (a), Abbott, C. J. alluded to the present question, and referring to Lord Kenyon's decision, which had been urged in the argument, said, "I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot be in the use of it." And Holroyd, J. said, "That the opinion of Lord Kenyon, in *The Rugby Charity v. Merryweather*, is somewhat shaken by the observations of Lord C. J. Mansfield, in *Woodyer v. Hadden*." So also, Best, J. * No man has a greater respect for Lord Kenyon than I have, but I think that decision was a departure from the principles usually received in law. If a road be for the accommodation of particular persons only, it is not a public road; and therefore I see no reason why the inhabitants of a street, which is not a thoroughfare, should not put up a fence at the end of it, and exclude the public."

Such is the opinion of several very learned Judges who have been on the Bench since Lord Kenyon's time; and, especially as we find this opinion supported by the authority of Lord Hale, it may be confidently predicted, that the decision in the case of the Rugby Charity will not be adhered to by future Judges; and therefore, that an indictment will not be allowed for the non-repair of a way which is no thoroughfare, nor will the parish be considered liable to maintain it.

It may be thought that I have been too long and too minute in the discussion of this point; but when we know that the case of the Rugby Charity was decided with the

(a) 5 Barn. & Ald. 454.

approbation of the Bar, and has been much looked up to as an authority; when it is considered how many important results depend upon the distinction between highways and private ways—a distinction not sufficiently attended to, as we see by the late Highway Acts, under which several different definitions have been ascribed to the term “Highway”;—when moreover it is recollected that we have to contend with the *dictum* of one very learned Chief Justice, and the decision of another equally eminent, I hope to be excused for endeavouring, even thus largely, to establish, that the proper definition of a highway is, “*Any thoroughfare which is open to all the king's subjects.*”

THE reasoning, which appears to establish the necessity, that a highway should be a thoroughfare, must also prove, as a direct consequence, that a *public navigable river* should also be a thoroughfare. But the nature of the thoroughfare, in the latter case, should not be mistaken. As a footway is a thoroughfare, if it continue into a carriage or horse way; so it will not be necessary that the river itself should flow from town to town; but it will suffice if the water communicate with any other highway, which leads to a town. Where, however, the *locus in quo* is a mere creek, running out of a navigable river, and does not reach to any other way, but is such, that every one, who passes up it, is obliged to return by the same channel; there, if the argument in this Chapter be correct, the way cannot be a highway. If in such a case, a right to passage be proved, it can be only for private occupation. The authorities on this subject are certainly somewhat confused; but they appear upon the whole to support the above conclusion.

It has already been shewn, that a river which is common to all the king's subjects is a highway (a). And one consequence from that doctrine is clearly established, viz. that the right to passage cannot be extinguished, except by writ of *ad quod damnum*, by Act of Parliament, or by natural causes. In *Vooght v. Winch* (b) a new trial was granted, because at the trial the Judge had told the jury, that twenty years possession was binding upon the rights of the public. In that case Holroyd, J. remarked, that an Act of Parliament is the only means by which such a public right can be determined. But that learned Judge, in the late case of *The King v. Mountague* (c), qualified his former opinion, by saying, that it may be done by a writ of *ad quod damnum*, and an inquisition found thereupon by a jury, as well as by an Act of Parliament. So also it may be extinguished by natural causes; (d) and he cited *Com. Dig. Chimin. A. 1.* where it is said, "A navigable river is in the nature of a highway, and if the water alters its course, the way alters." It may be remarked, that the case cited by Comyn, and also another case put by Fitzherbert (e), are both instances of a thoroughfare.

But, nevertheless, the requisites to a highway do not appear to have been kept clearly in view, when the nature of a public river has been considered. In one case (f), both Gibbs, C. J. and Heath, J. said, that the flux and reflux of the tide, though not absolutely inconsistent with a right of private property, is *strong prima facie evidence* of its being a public navigable river.

(a) See ante, page 4.

(b) 2 B. & A. 662.

(c) See 4 B. & C. 603.

(d) In this case, Mr. Justice Little-
dall said, "He conceived it

might be done, under certain circumstances, by the Commissioners of Sewers."

(e) Fitz. N. B. 515.

(f) Miles v. Rose, 5 Taunt. 705.

But in a much earlier decision (*a*), Lord Mansfield had said, "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows, that are not navigable rivers; and the place in question may be a creek in their own private estate." Yet in *Rex v. Mountague* (*b*), notwithstanding Mr. Justice Bayley confirms Lord Mansfield's opinion, still he lays down a criterion as to a public river, which does not seem to be at all decisive. He says, "The strength of this *prima facie* evidence arising from the flux and reflux of the tide must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time and by very small boats (*c*), it is difficult to suppose that it ever has been a public navigable channel." Now it is clear that unless a river is a thoroughfare it can never be calculated for the purposes of general commerce. But whether the water be continually of great depth, or only navigable for a certain portion of the day, by the assistance of the tide, in either case, it may, upon principle, equally become a public river; and in practice it is so, for many of our most important rivers owe their navigation to the tide. A public river must be navigable, but there does not exist the same necessity, that a navigable river must be a public one. So a road must be traversable, but it by

(*a*) *The Mayor of Lynn v. Turner*, Cowp. 86.

(*b*) 4 B. & C. 598.

(*c*) It might as well be said, that it is difficult to suppose a foot-path can be a highway, because horses and carts cannot traverse it.

It is a new distinction, that the size of the carriage is to determine the nature of the way. It may be evidence to go to a jury, as to the actual public use thereof: but can have nothing to do with the abstract principle.

no means follows that every road which is traversable is a highway. To render it such, there must be the united consent of the owner of the soil and the public, which is in general evidenced by the public user: and that user can only be where there is a thoroughfare; which circumstance is also requisite to shew that the way is of public utility, as a reason for its being a public burthen. It will not be disputed, that a public river is a highway (*a*). If so, it must be regulated by the same principles, which govern the *genus* of which it is a species. The river must (as a matter of fact, not of principle) be navigable, in order that the people may use it. But it cannot become public and a highway, until the right to use it be proved by possession. For be it as deep as it may, unless there is a custom to support the public right, the owner of the soil may sue any one who, by using the water, trespasses over his private property. And farther, the way along the course of the water must be a thoroughfare, in order to establish the utility of the way, and also as a foundation without which a general user thereof by the public can never be presumed. Without this, the public can never be liable to its maintenance. And although a navigable river may not require to be repaired as constantly as a road, yet the case of *The Mayor of Lynn v. Turner* (*b*) is in point to shew, that a charge for its amendment may sometimes be incurred; and that it is not a merely speculative consideration, as to who is liable to perform that duty, whenever it may be necessary.

(*a*) See *Rex v. The Severn and Wye Railway Company*, 3 B. & A. 646, where a railway was held to be a highway, to be used in that particular mode. So a river is a

highway to be used in a particular mode. It seems quite analogous to the case of a rail-road.

(*b*) *Cowp.* 86.

CHAPTER II.

AS TO THE RIGHT TO THE SOIL OF HIGHWAYS.

IN distinguishing between public and private ways it has been shewn that the former must be "*open to all the king's subjects.*" It remains, now, to discuss how far this interest of the public extends, and where it stops—a question, the practical importance of which is heightened, on account of the nature of several of the requisitions which are contained in the late Highway Acts(*a*).

It seems to be clearly established, though there are not many decisions upon the point, that any right of way, whether it be public or private, is nothing more than an easement upon the land over which it extends: and that the freehold and soil, and all other rights, which are not inconsistent with the public use of it as a way, remain either in the owners of the adjoining lands, or in the lord of the leet, or in such other person as can claim the same by way of prescription.

Thus it has been held, that a way must not be claimed as appendant or appurtenant to a house, *because it is only an easement* and no interest(*b*). But it may be *quasi* appendant thereto, and as such pass by grant thereof(*c*).

(*a*) 13 Geo. 3. c. 78, and 55
Geo. 3. c. 68.

(*b*) Yelv. 159.

(*c*) Cro. Jac. 190.

Some of the oldest cases are given by Rolle (a). By these it is expressly decided, that the king has only a passage for him and his people; but that the freehold and all the profits, as trees, &c. belong to the lord of the soil (b).

And again, that if trees are growing on the highway, the lord of the leet shall have the trees (c). We may reasonably conclude, that this decision applies to ways over waste land, the soil of which is vested in the lord of the leet: for by another case it is said, that, generally, the owner of the soil on both sides of the way shall have the trees growing on the way (d). But the lord of the rape may *prescribe* for all trees growing on any highway within his rape (e).

And in the case of *Sir John Lade v. Shepherd* (f), which was an action of trespass, it appeared that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years before built a street upon it, which had ever since been used as a highway: that the defendant had land contiguous, parted only by a ditch, and that he laid a bridge over the ditch, the end whereof rested on the highway. And it was insisted for the defendant, that by the plaintiff's making it a street, it was a dedication of it to the public; and therefore, however he might be liable to an indictment for a nuisance, yet the plaintiff could not sue him as for a trespass on his private property. *Sed per Curiam*, It is certainly a dedication to the public, so far

(a) 1 Roll. Abr. 392.

(b) 8 E. 4. 9.—2 E. 4. 9.—8 H.
7. 5 b.

(c) 27 H. 6. 8.

(d) 18 Eliz. B. R. cited 11 Jac.
B. R.

(e) *Per Cur.* Sir Thomas Pel-
ham v. Wiatt and Black, 11 Jac.
B. R.

(f) 2 Stra. Rep. 1004.

as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil. So the plaintiff had judgment (a).

And see also *Doraston v. Payne* (b), where *Bro. Abr. Trespass*, pl. 131, is cited, to shew that the owner of the soil of a highway may bring trespass, if the cattle do any thing but merely pass and repass. And Eyre, C. J. and Heath, J. expressly called the right of passage along a highway *an easement*; and all the Judges agreed that it would be trespass if cattle were found depasturing on a highway. It was a case in replevin—for taking the cattle of the plaintiff; and a plea was made in bar of the avowry of damage feasant, that the cattle, *being in a highway*, escaped through the defect of fences. To this plea a special demurrer was put in, for that it did not shew that the cattle *were passing through and along the said highway*. For if they were trespassing, then the defect of fences was no excuse. And the plea was decided to be faulty, because the cattle would be trespassing if they did any thing more than pass and repass; and therefore this fact being traversable, should be stated with certainty.

This authority is confirmed in its fullest extent in the case of *Stevens v. Whistler* (c), where the plaintiff, who was owner of the land adjoining only on one side of the highway, was held to be able to maintain an action of trespass against one who had suffered his cattle to depasture along the highway. Here the plaintiff had declared *generally* for a trespass in his close called *Shepherd's Lane*. And a motion was made to set aside the verdict, because at most he was only entitled to the soil

(a) See also 2 Inst. 705.

(b) 2 H. Black. 527.

(c) 11 East, 51.

and freehold of half the lane opposite to his own inclosures. *Sed per Cur.* The plaintiff had an exclusive right to part of *Shepherd's Lane*; and if the defendant meant to drive him to confine the trespass complained of upon the face of his declaration, to that part of the lane which was his, he should have pleaded soil and freehold in another; which would have obliged the plaintiff to new assign.

There is a very strong instance, where this right in the owner of the soil has been proceeded upon at law, in the case of *Goodtitle v. Alker and Elmes* (a), where he sustained an action by *ejectment* for land, over which was a public right of way. It was objected to the action by the defendant, that the sheriff could not deliver possession. This the Counsel for the plaintiff denied; in proof of which they mentioned a note of a case before Lord C. B. Pengelly, in Wiltshire, where an *ejectment* was brought for a cottage in a highway, and it was there objected, that the action would not lie, because the sheriff could not deliver possession; but Lord C. B. Pengelly over-ruled the objection, and said, that Mr. J. Powell had been of the opinion which himself then went upon, and had done the like. They insisted strongly, that the sheriff can give seisin of the thing, subject to the rights of others upon this property for particular easements: and they cited *Co. Litt. 4 a.* and the case of *Welden v. Bridgewater* (b). For the rights of others are not to the possession, but to *mere easements*, which are collateral to the thing itself. And there is no reason for making any difference between public and private easements. This argument might as well be used in regard to such an easement as a right to set up stalls in a fair or market.

(a) 1 Burr. 133.

(b) Cro. Eliz. 421.

But the case of *The Mayor of Northampton v. Ward* (a) is a full proof "that trespass is the proper remedy for erecting stalls in a market." They also urged, that a proceeding upon *ad quod damnum* alters no property; the owner retains the old road, discharged of the easement which is transferred to another part of his land. Lord Mansfield, C. J. in giving judgment, referred to 1 *Roll. Abr.* 392, that the freehold and all profits belong to the owner of the soil. "So" he observed, "do all trees upon it, and mines under it, which may be extremely valuable. The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it by a writ of *ad quod damnum*. It is like the property in a market or fair. There is no reason why he should not have a right to all remedies for the freehold; subject still, indeed, to the servitude or easement. An assize would lie, if he should be disseised of it; an action of trespass will lie for an injury done to it. I see no ground why the owner of the soil may not bring ejectment as well as trespass. It would be very inconvenient to say, that in this case he should have no specific legal remedy; and that his only relief should be repeated actions of damages for trees, mines, salt-springs, and other profits under ground. It is true, indeed, that he must recover the land *subject to the way*; but surely he ought to have a specific remedy to recover the land itself, notwithstanding its being subject to an easement upon it." And Mr. J. Denison and Mr. J. Foster entirely agreed with Lord Mansfield's view of the case.

In the case of *Davidson v. Gill* (b) Lord Kenyon held, that the trustees of a turnpike road had not the soil thereof vested in them, so as to be enabled to give a

(a) 2 *Str.* 1238.

(b) See 1 *East*, 69.

sufficient consent to the diverting a public footpath into their highway. His Lordship observed, "The soil was not vested in them, but remained in the persons, who were entitled to it before the Act passed by which they were appointed. The trustees have only the *controul* of the highway."

As a consequence following directly from the doctrine, that the right to the soil in a highway is, presumptively, in the owners of the adjoining land, it has been decided, that any small portion of land lying between the highway and the adjoining property belongs to the owner of the latter. Thus in *Grose v. West* (a) Gibbs, C. J. says, "*prima facie* the presumption is that a strip of land lying between a highway and the adjoining close, belongs to the owner of the close; as the presumption also is that the highway itself, *ad medium filum viæ*, does. But the presumption" he adds, "is to be confined to that extent, for if the narrow strip be contiguous to or communicate with open commons, or larger portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them." (b)

And in a late case the plaintiff brought ejectment to recover possession of a small piece of land by the side of a turnpike road. About thirty-three years before, the defendant inclosed the land in question, which was then

(a) 7 Taunt. 39.

(b) And see *Steel v. Prickett*, 2 Stark. N. P. Rep. 463. Whether it be part of the common lands in the manor, and so the property of

the lord, or only an individual slip of unoccupied land, and therefore parcel of the adjoining property, is matter of circumstance.

waste. One Trafford was then owner of the freehold of the land on each side of the road. In 1808 the lessor of plaintiff purchased the estate of Trafford. In 1816 he demanded sixpence rent of the defendant, who paid it on three several occasions. Nothing was said to him about the right in which the rent was claimed. In 1822 notice to quit was given, which he refused to comply with, contending that he had a right to the close. The action was tried at Chester; and the learned Chief Justice told the jury that, if they believed the evidence as to payment of rent, they must find for the plaintiff. A verdict having been found accordingly, the defendant moved for a rule *nisi* for a new trial; but the Court of K. B. refused to allow it (a).

I have been the more particular in my endeavour to ascertain the extent of the public interest in a highway, and to shew that they are entitled to nothing more than a mere easement, because this fact does not appear to have been sufficiently attended to in framing the late Highway Acts; so that some of the provisions are obscure, and may furnish curious points for litigation. By the 13 Geo. 3. c. 78. s. 17, when a new highway shall be made as thereinbefore directed, the old highway is directed to be stopped up, and the *land and soil* thereof sold by the surveyor to some person or persons whose lands adjoin thereto, if willing to purchase the same; if not to some other person for the full value thereof; and after payment of the purchase-money, it is declared that *the soil* shall become vested in such purchaser and his heirs; but all mines, minerals, and fossils lying under the same shall continue to be the property of the persons who

(a) Doe d. Jackson v. Wilkinson, 5 B. & C. 413. Vide Scales v. Pickering, 4 Bing. 448.

would have been entitled to the same if such old highway had continued there. And by the 55 Geo. 3. c. 68. s. 2, unnecessary highways are directed to be stopped up, and the soil thereof sold in a similar manner.

It seems evident from the wording of these Acts, that a point was taken for granted, which admits of very great doubt, I mean, the power to sell that of which a sale is directed. The surveyor of a highway can possess no greater interest in it than the public, whose servant he is; and if *they* have no title to the soil thereof, it is difficult to say how *he* can dispose of it; unless indeed we construe the Act of Parliament to have the effect, in the first place of divesting the freehold out of the owner, and then of granting the same to the surveyor, after which he is invested with the power of sale. It may be admitted to be clearly the intention of the Legislature, that the soil of all unnecessary highways should be sold. But however the clause may be framed upon a false supposition as to the state of the law, yet it appears by no means to be so clearly worded as to alter that law. It will not, surely, be maintained that private property can be torn from the owner, and that too without any compensation, merely by *implication*. Individual rights ought not to be destroyed but by plain and express words; nothing less than an absolute enactment to that effect should suffice. We have seen that in one case Lord Kenyon decided that a Turnpike Act did not vest the *soil* of the road in the trustees; and it is highly probable, that the above Acts will not be considered as bestowing upon the surveyor of a highway that freehold and inheritance, which by law belong to private individuals.

Assuming then that the power of sale now under consideration, cannot embrace any greater estate or interest,

than such as the public were entitled to before its creation, the enactment appears to be defective as to the means of accomplishing such a sale. For, to omit any question which might arise as to the power of conveying this public easement, otherwise than by way of release to the owner of the soil, let us consider what interest would be obtained by the purchaser. Now the sale must be made to one of three classes of purchasers—either 1st, To a mere stranger—2dly, To the owner of the land adjoining only on one side of the way, or 3dly, To both the contiguous proprietors in equal moieties.

1st. If the purchase be made by a stranger, what will he acquire? The trees growing on the way cannot be his, for they already belong to the owner of the nearest adjoining land. For the same reason all mines, minerals, and other valuable property under-ground would have been out of his power, even if the Act itself had not deprived him of them. Several of the cases before cited, and especially that of *Goodtitle v. Alker and Elmes* (a) clearly establish both these points. But, to proceed still further, this unfortunate purchaser, having obtained neither trees nor mines, will discover that it will not even be permitted him to grow grain upon his newly-acquired territory. For if he plough the land, he will render himself liable to be sued as a trespasser. To prove this I need only refer to a case which is reported by Godbolt (b), and the case of *Sir John Lade v. Shepherd* (c). And to conclude the whole, he will not acquire even a right of pasturage (d).

2dly. If the purchaser be the proprietor on only one side of the way, his right will be complete to no more

(a) 1 Barr. 133, and ante, p. 26.

(b) See Godb. p. 59.

(c) 2 Stra. 1004, and ante, p. 24.

(d) *Stevens v. Whistler*, 11 East, 51, and ante, p. 25.

than one moiety of the land; and as to all beyond the *medium filum viæ* he must be considered as a stranger.

3dly. We may conclude then, that the third class of purchasers, viz. both the adjoining owners, are those, and those only, who can safely buy what the legislature has directed to be sold. If they refuse to purchase, the land must remain unsold, since the Act contains no provisions to oblige them to a compliance: and in such a case it should seem, that the highway cannot be stopped up, as the order of the justices must be *for the sale* as well as the stopping up thereof (*a*).

I shall just refer to the General Inclosure Act (*b*), as containing a strong confirmation of the doctrine which I have been endeavouring to support. By that Act directions are given for the setting out of private and public roads over the lands to be inclosed. And by the 11th section it is enacted, "That after such public and private roads and ways shall have been set out and made, the *grass and herbage* arising thereon shall for ever belong to and be the sole right of the proprietor of the lands and grounds which shall next adjoin the said roads and ways on either side thereof, as far as the crown of the road." Suppose that one of these public roads was to be stopped up and sold, under the provisions upon which I have been commenting, the right to the grass and herbage would belong, by one Act of Parliament to the adjacent proprietors, and by another to a stranger.

WHILE we are considering the respective rights of the public and the owner of the soil in a highway, we naturally direct our attention to the peculiar case of a *Ferry*.

(*a*) *Rex v. Kenyon*, 6 B. & C. (*b*) 41 Geo. 3. c. 109.
640.

And we shall find that, although its nature is *svi generis*, yet it is not inconsistent with the general principles of the law regarding highways. Most of the confusion, which has prevailed upon this subject, appears to have arisen from not distinguishing between the public privilege and the private right, which unite to form a ferry—the public privilege of passing across the water, and the private right to carry the passengers over and to receive the toll.

In the first place, in the case of a ferry, the public by long usage acquire a right of passage over the water, subject to the payment of toll; the *locus in quo* is therefore a highway; and it is liable to all the consequences attaching upon highways (*a*). It follows that, for any obstruction to the use of a ferry by the public, the remedy proper to be pursued is an indictment; and therefore, if the ferryman, after tender of the requisite toll, refuse to carry passengers over, it should seem that he will thereby render himself liable to this form of action (*b*). And the interest of the public in a ferry is exactly similar to their interest in highways in general; consequently they are only

(*a*) We have seen that a river may be a highway, ante, p. 4.

(*b*) See *Payne v. Partridge*, 1 Salk. 12. Plaintiff declared that there was a common ferry, and a prescription for the inhabitants of L. to pass toll-free; that defendant was owner of the ferry and let it decay, and that when plaintiff requested him to let him go over the ferry, he refused. Defendant pleaded that he had built a bridge instead of it. *Per Cur.* He could not let down the ferry and put up a bridge without licence and an

ad quod damnum; the custom was good in the nature of an easement, but that the custom consisted not in the right to pass, for *that was common to all the king's subjects*, but in the right to pass toll-free. Therefore, the plaintiff could not maintain an action for not passing; for so any other subject might bring an action, which would be endless and infinite. *Aliter*, if toll had been exacted and paid by him; that had been a *special damage*, but, without special damage, he can only indict or bring information.

possessed of an easement, and can claim no property in the soil. The privilege of landing at either end of the ferry is an easement upon the freehold; it is not necessary that even the proprietor of the ferry should have any property in the soil on either side, although he must have a right (or more correctly speaking, the people have a right) to use the land on both sides of the water for the purpose of embarking and disembarking passengers. This is the same as to say, that there can be no ferry where there is no highway; and it is confirmatory of the doctrine, that every highway must be a thoroughfare. The case of *Peter v. Kendal & al.* (a), favors what has been stated. It was an action on the case for the disturbance of a ferry. The plaintiff was not possessed of the land on either side thereof; and it was objected to the action, that there could not by law be a ferry, unless the owner had the right of soil on both sides of the water; and in support of that position, *Saville*, 11, *pl.* 29 was cited, where it is said to have been held for law in the Exchequer Chamber, "That a ferry is in respect of the landing-place and not of the water; that the water may belong to one, and the ferry to another; and that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he cannot land on the other side." But the Court over-ruled the objection, saying, that the owner of the ferry must, as incident to the ferry, have such right to use the land on both sides, as to enable him to embark and disembark his passengers; but he need not for that purpose have any property in the soil. And it was said, that this right to use the land for all the purposes of the ferry, is an incorporeal hereditament.—This case clearly decides that the property in the soil is by no means incident or ne-

(a) 6 Barn. & Cross. 703.

equary to the property in the way. But the Court seem not to have traced the principle to its source. The true reason, from which to derive it, is, that a ferry is as much a highway as a bridge; that therefore it is the public who have a right to be embarked and disembarked at the landing-places; and not, that the owner of the ferry can claim such as his individual privilege. For any attempt to oppose this public right, the proprietor of the soil would make himself subject to an indictment; and I apprehend that, in such a case, the ferryman could support his private action only by *shewing a special damage*. It is a direct result from the admission that the ferry is a highway, that not only it is unnecessary, but even that it is impossible, that the public use should be attached to the ownership of the soil. The right of landing, and the property in the soil of the landing-places, must be distinct rights, the one in the proprietor and the other in the public; and they cannot, at common law, by any possibility exist together.

But in the second place, the misconstruction of the case reported by Saville, arises from confounding the right of passage and of landing, which is a public right, with the right of carrying the passengers across the ferry and receiving the toll, which is a franchise, a private and prescriptive right.

Under the feudal system the lord of the soil, or manor, was entitled to a toll to be paid in passing his bridge, or along his highway, or at his market. This was enjoyed by him as a remuneration for the privilege of using his property, which he had departed with in favour of the public; it was the consideration for which he granted the right of way over his territory, or the use of his land for the purpose of a market. And it is worthy of remark in proof of this position, that at the

present day, the right to receive the toll can be supported only where such a grant can be shewn, or may be presumed to have existed (a). And it necessarily flows from this, that the franchise can only be enjoyed by the lord and those who claim under him; for none other except the lord could have had power to make the grant, which is necessary to support the claim of toll.

The same reasoning applies to the instance of a ferry. The lord would be the only person who could dedicate it to the public use, for none but the owner of the soil could convey the right of passage, and of embarking and disembarking. And further, it is evident that, unless he was the proprietor of the land on both sides of the water, his *power of granting* must be defective; for though he might permit the public to embark at his side of the water he could not give them the right to disembark upon the other side: consequently, he could not establish and become owner of a ferry, for as there would be no thoroughfare, there could be no highway; and without a highway there could be no right to take toll. Where, however, his possession was sufficiently extensive, the franchise of the ferry must originally be the property of the lord, as *owner of the soil*. This argument appears to reconcile the case in Saville with general principles, by restricting its application to the private right of the owner of the ferry; and it renders the whole subject clear and intelligible. There is, however, one expression in Saville which requires explanation. It is said, that a ferry is in respect of the landing-place and not of the water, and that the water may belong to one, and the ferry to another. This is certainly in part correct;

(a) A right to toll can be supported only where some consideration for it exists, or may be pre-

sumed. See *Hill v. Smith*, 4 Taunt. 520; and *Lord Pelham v. Pickersgill*, 1 T. R. 660.

for if the water be a navigable river, and therefore a highway, the ferry over it may be established at any time; but if it be private property, it would clearly be an act of trespass to pass over it without the consent of the owner. The ferry is, in such case, an easement on the private property, and may be acquired with the consent of the owner, but can never be against his will.

I have endeavoured to shew that the right to a ferry must originally have belonged to the owner of the land, and must still be derived through him. But it does not follow that this is a franchise inseparable from the soil, and that the lord would have no power to grant it to another. In *Peter v. Kendal* Holroyd, J. calls it an incorporeal hereditament; being such, it is certainly the subject of a grant, and may well be delegated. It was said in the case of *Rex v. Nicholson* (a) *arguendo*, That a ferry is real property—an incorporeal hereditament within the parish—that it is demandable in a *precipe quod reddat* (*sed quære*)—that an assize clearly lies for it—that the owner may prescribe for it, and have a seisin in fee of it. It owes its birth to the land over which it is exercised; but it by no means follows, that it cannot have an independent existence.

ANOTHER point of law, which presents itself to our notice, when we are discussing the respective rights and interests of the public and the neighbouring land-owners in a highway, is one which, owing to the present advanced state of internal communication throughout the country, is now chiefly applicable to footpaths. If a common highway is so foundrous and out of repair as to

(a) See 12 East, 334.

become impassable, or even dangerous to be travelled over, or incommodious, the public have a right to go upon the adjacent ground; and it makes no difference whether it be sown with grain, or not (*a*).

And indeed it hath been holden, that if there be an highway in an open field, and the people have used, time out of mind, when the way was bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; from whence it follows, that if such outlets be sown with corn, and the beaten track be foundrous, the king's subjects may justify going upon the corn (*b*).

And in one case it was held, that where a man incloseth, and doth not make a good way, (as in such a case he is bound to do by reason of the inclosure) it is lawful for passengers to make gaps in his hedges to avoid the ill way; so that they do not go further into his inclosed grounds, than is needful for avoiding the bad way. This, it may be observed, was the case of a footpath (*c*).

But this privilege of going over the adjoining land, if the way be impassable or foundrous is confined to highways; and the grantee of a private way cannot take advantage of any such liberty. This was decided by the case of *Taylor v. Whitehead* (*d*). And that decision is confirmed by the late case of *Bullard v. Harrison* (*e*);

(*a*) See 1 Roll. Ab. 390—A. pl. 1.—and B. pl. 1.

(*b*) 1 Hawk. P. C. c. 76. s. 2.

(*c*) Henn's Case, Sir W. Jones, 296.—See also *Absor v. French*,

28 How. 28, pl. 19.—2 Lev. 234. S. C. and Young v. —, 1 Ld. Raym. 725.

(*d*) Doug. 745.

(*e*) 4 M. & S. 387.

in which the *locus in quo* was a private way; and it was endeavoured, but without success, to establish this right of traversing the adjoining land, upon the plea of necessity. Lord Ellenborough, in delivering the judgment of the Court, said, "The question intended to be agitated upon this record is, whether, in the case of a private way, the grantee may break out and go *extra viam* if it be impassable, as in the case of a public way. As to that, I consider *Taylor v. Whitehead* has settled the distinction, that the right of going on the adjoining land extends not to private as well as public ways. And there may be many reasons, in the case of highways, why the public should have an outlet; because it is for the public good that a passage should be afforded to the subjects at all times. But the same necessity does not exist in the case of a private right. Whoever will look to Serjeant Williams's note to *Pomfret v. Rycroft* (a), will find both the law upon the subject, and the manner of pleading a way of necessity, very accurately detailed. It is a thing founded in grant, and the grantor of a private way does not grant a liberty to break out of it at random, over the whole surface of his close. It is established law, that the grantee of a private road cannot break out of it."

(a) 1 Saund. 323, note 6.

CHAPTER III.

HOW A HIGHWAY MAY ORIGINATE,

A HIGHWAY, as has been shewn, is that which is open to be traversed by all the king's subjects. This right of passage depends, usually, upon possession: and whenever the possession has become general, the public are at liberty, by law, to avail themselves of the way, without any specific grant from the owner of the soil. It is reasonable that public rights should be more easily acquired, than such as belong only to individuals; and that the same documentary evidence should not be necessary to their support. The publicity, which must always attend the usage of any privilege by the people at large, renders needless those rules as to writings and investiture, which have been established to make certain and to free from fraud the transfer of private property. Yet even with regard to such property, adverse possession, for a prescribed length of time, is a legal bar to outstanding claims, if they remain so long unprosecuted. It is not, then, unjust that the public shall, after a still shorter period of unmolested enjoyment, become absolutely fixed in the possession of their privileges, in consequence of the greater notoriety of their proceedings.

And it should seem, that this uninterrupted possession is the *only* mode, at the common law, by which the public can acquire a right of way. For though it is stated in some of the books, that a way may originate by licence granted upon a writ of *ad quod damnum*, yet I doubt

whether an entirely new way could ever be created by such a proceeding. This writ appears to be calculated only for the purpose of changing and diverting highways; and can hardly be applicable to the acquisition of a right of way, where there is no previously existing one to be given in exchange for it. What party is there to sue out the writ? or what return can be made to it? Instead of being able to certify that no loss would ensue the proposed measure, the fact is, that it must be injurious to the property over which the way is to pass, and ought to be so stated on the return. On the other hand, it must be a clear gain to the public, and would not require so complicated a procedure to prove it.

We may conclude, therefore, that the title to all highways must be derived from one or the other of the two following sources:—1st, From custom, usage, or possession, as above described: or 2dly, From that all-powerful instrument, an Act of Parliament.

FIRST.—The principal mode of acquiring a public right of way is by uncontested possession. The public, as a body, have no purchasing power; even a parish is unable to become a party to a contract, and can, therefore, enter into no agreement as to the sale of a right of way: and even if such were not the case, they are possessed of no funds, which, under the common law, could be applied to such a purchase. Hence the *motive* for the cession of a right of way by the owner of the soil, must be supposed to proceed from himself, and not from the public: and that which is, in point of fact, acquired by adverse possession, is considered by the law as emanating from the bounty and free-will of the proprietor; although it may be entirely without his actual consent, and opposed

to his wishes: and it is said, in legal phraseology, to become vested in the public by the *dedication* thereof to their use on the part of the land-owner.

As to what acts or omissions are sufficient to constitute this dedication, is a question upon which no certain rules can be laid down as applicable to every case. The authorities upon this part of our subject are somewhat confused; but several distinctions have been established, which I shall proceed to detail, and to state those circumstances, which must combine, ere an intention to dedicate a way to the public use can be inferred from the user thereof by the public.

A dedication is supposed to take place through a mutual agreement between the owner of the land and the public; therefore, the consent of both these parties must be expressly or impliedly given. In general, the express acquiescence is confined to the public, who are to benefit by the way, and through whose actual use of it the right is established: while the assent of the owner is to be implied from indirect evidence. He is bound by a *non-feasance*; and his voluntary relinquishment to the public of a right of passage is, not unfrequently, merely suppositious.

I shall proceed to consider, 1st, What is sufficient evidence of an intention to dedicate, on the part of the owner of the soil: and 2dly, How far the consent of the public is requisite.

As to the 1st point, it may be observed, that there may be circumstances, which are esteemed so unequivocal in their nature, as to afford decisive proof of a relinquish-

ment to the public use by the proprietor, without any regard to the length of their duration.

Thus in one case (*a*), the owner of the property had some years before *built a street upon it*, which had ever since been used as a highway. And it was insisted, that by his making it a street it was a dedication to the public. And *per Cur.* It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage.

In one case (*b*), where the *locus in quo* was a creek from the River Thames, which had been made navigable by the predecessors of the defendants, and was kept in a navigable state by means of their cleansing it; and the tide flowed up it as far as the premises of the defendants, which were wharfs: it was proved, on the part of the plaintiff, that there were instances, though few in number, of boats going up the creek without the permission of the defendants, some for the purpose of *cutting reeds*, and others on parties of pleasure. Yet these were adjudged sufficient instances of usage to imply a dedication to the public: Gibbs, C. J. observing, "That the instances, though few in number, were very important in their nature. The going up for the purpose of cutting reeds was a very strong act."

Where the acts by the owner are not so specific in their nature, or so determinate in their object, as clearly to prove his intention that the public should acquire a right of way, they are frequently aided by collateral evi-

(*a*) Sir John Lade v. Shepherd,
2 Stra. 1004.

(*b*) Miles v. Rose, 5 Taunt. 705.
1 Marsh. 313. S. C.

dence: and the circumstance of most common occurrence, which is considered sufficient to support the claim of the public, is the length of time during which they have had the uninterrupted use and enjoyment of their privilege. But, of course, the weight of this, as of any other evidence, must depend, in each instance, upon the particular features of the case. Nor has any certain period been prescribed, as necessary to support a dedication. In one case six years was held to be sufficient; while, in another instance, four years was considered to be too short a term.

In the case of *Rex v. Lloyd*(a), it appeared that the place in question was a narrow passage, lying on the north side of Snow-hill, called Cock-court, and which, being of an oblong shape, leads from one part of the street to another, without having any outlet elsewhere. The houses all the way round had once belonged to the same individual; and the defendant, having purchased those at the top of the court, built a wall across there, intercepting all communication between the two sides, unless by way of Snow-hill. Till then the passage had been open as far back as could be remembered. And the defendant was, therefore, indicted for obstructing the highway. Lord Ellenborough, who presided at the trial, observed, that "if the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to

(a) 1 Campb. 260.

be excluded from it, after being allowed to use it so long without any interruption."

In the well-known case of *The Trustees of the Rugby Charity v. Merryweather* (a), the period of eight years was held to be a sufficient length of time, whereon to presume a dedication. Lord Kenyon said, "It is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, *six years* was held sufficient.

In the case of *Rex v. Hudson* (b), however, user for four years was considered to be too short a period.

The remarks of Mr. Justice Chambre, in the case of *Woodyer v. Hadden* (c), are well worthy of attention, as shewing the test whereby all questions of dedication ought to be tried. He says, "No particular time is necessary for evidence of a dedication; it is not like a grant presumed from length of time; if the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses, opening into an ancient street at each end, making a street, and sells or lets the houses, that is *instantly* a highway (d).

We have seen that the question of dedication is nothing more nor less, than a question as to the intention of the supposed donor of the right of way. In the case of an adverse possession by the public, he is bound, as it were by estoppel, not to deny a dereliction, which his conduct

(a) 11 East, 375, note.

(b) 2 Stra. 909, et post.

(c) 5 Taunt. 125—See page 137 of the Report.

(d) See the case of Sir John Lade v. Shepherd, ante, page 43.

is by the law supposed to warrant. Yet, still, the intention is the point where the matter hinges; and it follows, that wherever he has done any act inconsistent with the public right of passage, or any other circumstances occur which negative the implication of his assent, the dedication cannot be inferred.

The method most commonly adopted, with regard to new streets, to prevent the way from becoming open to the public, is to place a bar across the street, to open and shut at pleasure. The Duke of Bedford has done so in Southampton Street, Covent Garden. And it is decided, that although this bar be placed only across the carriage road, yet it is sufficient evidence as to intention, on the part of the owner, to exclude the public from any right to the footpath.

Thus in one case (a), to an action of trespass the defendant justified under a public right of way. It appeared in evidence, that some years ago a street was made over the *locus in quo*, which had been before an inclosed field; that soon after the houses were finished a bar was placed across the street, to prevent carriages from passing through it, but that the bar *was soon knocked down*; since which time it had been used as a thoroughfare. On the part of the defendant it was contended, that this amounted to a dedication to the public, *at least as a footpath*. But Heath, J. observed, "That the putting up of the bar rebutted the presumption of a dedication to the public. Such a dedication must be made openly and with a deliberate purpose. Nor could there be a partial dedication to the public, although there might be a grant of a footway only. This street was to be considered

(a) Roberts v. Karr, 1 Campb. 262, note b.

merely as a way for the use of the tenants, inhabiting the houses on each side of it."

In another case (*a*), where trespass was brought for entering the plaintiff's close, and pulling down a gate, the defendant pleaded a public footway. It appeared in evidence, that the gate in question had been recently put up in a place, where a similar gate had formerly stood, but where *for the last twelve years* there had been none. It was therefore contended for the defendant, that from suffering the gate to be down for so long a period, and permitting the public to use the way without obstruction for so many years, the plaintiff and those under whom he claimed must be considered as having completely dedicated the way to the public, and that the gate could not be replaced. The plaintiff, however, under the direction of *Marshall*, Serjeant, had a verdict; and the Court of King's Bench, the following Term, refused a rule nisi to set aside the verdict.

And here we must again question the decision of Lord Kenyon in the case of *The Rugby Charity* (*b*). It was an action of trespass brought by the trustees to try a right of way in dispute between the plaintiffs and the Governors of the Foundling Hospital. There were several pleas of justification on the record; amongst others, one stating that the *locus in quo* was a common highway, and that the supposed trespass was committed in removing an obstruction there. The evidence was, that the right of soil was clearly in the plaintiffs; but there had been a common street there, though no thoroughfare (*c*),

(*a*) *Lethbridge v. Winter*, 1
Campb. 263, note.

(*b*) 11 East, 375, note.

(*c*) As to this point, see ante,
page 9.

by reason of the houses at the end, for above fifty years. The plaintiffs accounted for not having put up a bar or the like, to denote the way was not relinquished to the public at large, by shewing that the *locus in quo* had been in lease for a long term up to the year 1780. Lord Kenyon asked, what the plaintiffs had to say to the time from 1780 till about two years ago, (the action was brought in 1790) when they had put up a bar. In answer it was said, that they had been in treaty with the Foundling Hospital respecting the allowing them the right of way, which was finally broken off. *And per Lord Kenyon*, "If this rested solely on the ground of a question of right between the plaintiffs and the Foundling Hospital, the former would certainly not have been barred by the time which elapsed from 1780 till the obstruction was put up, pending the treaty between them; but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever; and therefore it is now too late to assert the right." Now, if dedication be entirely a question of intention, and length of possession only applicable as evidence of that intention, it is a direct consequence, that if the presumption *prima facie* resulting from the possession be rebutted by evidence of a contrary tendency, the inference of a dedication can no longer be supported. That the mere fact of the possession cannot, under all circumstances, be conclusive proof as to the right, has already been shewn in several cases, and may be observed in others which will afterwards be cited. And we see, that in this case, all the direct evidence as to intention is clearly opposed to the claim of the public. Upon what reasoning, then, can it be supported? I do not see how the last cited cases of *Roberts v. Karr* and *Lethbridge v. Winter*, and that of *The Rugby Charity* can stand together.

And although in the case of *Woodyer v. Hadden* (a), the three Judges who ruled the decision, avoided any express denial of the authority of Lord Kenyon's judgment; yet as Mr. Justice Chambre, who opposed the other Judges, relied for his opinion upon its authority, we may fairly conclude, that the relation between the two cases is very much that of decided hostility. The plaintiff had erected a street, leading out of a highway across his own close, and terminating at the edge of defendant's adjoining close, which, for twenty-one years, had been separated from the end of the street by the defendant's fence. The houses had been erected, and a foot pavement on each side of the way, and a horse pavement on one side, as far as the centre of the horse road, and extending the whole length of the street to the defendant's land, had been laid down for about eighteen or nineteen years before the trial; but the horse pavement, on the other side of the way, had at no time before the trial extended along more than a part of the street. Upon these facts the Court of C. P. decided, that there was not evidence of a dedication to the public use. *Per Gibbs, J.* "Although the same time is not necessary to dedicate a highway as is required to establish a right of possession to land against an hostile claim, yet time is an ingredient. Now in this case I think there is not time enough to presume a dedication. The foot pavement was finished, the horse way was not completely finished; *there had been a negotiation for opening it, and that had gone off.*" *Per Heath, J.* "No fact in this case shews that the owner meant to give the public any right over this land, beyond a right of passage to the respective houses." *Mansfield, C. J.* concurred, but his observations are almost confined to the question about a thoroughfare.

(a) 5 Taunt. 125.

Where the user by the public, which is proved, is accounted for by circumstances inconsistent with a complete dedication to the public; as where the dereliction has been only for a definite and limited period; the implication is destroyed, and the public must rest content with the restricted right.

Such was the case of *Rex v. Hudson (a)*, where on an information for stopping up a common footway, the prosecutor proved, that it had been a common passage under the defendant's house as far back as any witnesses could remember. But the defendant producing a lease made for fifty-six years of this way, to the intent it might be a passage during the term, and the term expiring in 1729; the *Chief Justice (b)*, held the defendant *Not Guilty*; and as to leaving it open since, he said that would not be long enough to amount to a gift of it to the public. This case occurred in 1732, thus making the period relied upon to support a dedication about four years.

And this point is confirmed by the case of *Rex v. The Inhabitants of Northampton (c)*, where it was held, that though there cannot be a partial dedication to the public of a bridge or highway, still the dedication may be limited in point of time.

It is a disputed point whether the dedication of a way can be *partial in its extent*, although it seems to be decided that it may be limited in its duration.

In the case of *Roberts v. Karr (d)* before cited, where a bar had been placed across the carriage-way in a street,

(a) 2 Stra. 909.

(b) Lord Raymond.

(c) 2 M. & S. 262.

(d) 1 Campb. 262, note b, and ante, p. 46.

but was not prolonged over the footpath, it was contended, that admitting the private right to be protected in the former, yet the dedication was complete as to the latter. But Heath, J. said, there could not be a partial dedication to the public, although there might be a grant of a footway only.

In *Rex v. The Inhabitants of the County of Northampton* (a), it appeared that the bridge in question was used by the public at all times on foot and with horses, but only occasionally with carriages, except in times of flood or frosts, when it was unsafe to pass through the river, at which times carriages always passed over the bridge. In ordinary times the carriage road went through the ford, and the bridge was sometimes barred against carriages by means of a post and chain which was locked. It was held to be a public bridge, Lord Ellenborough, C.J. saying, "Though it must be an absolute dedication to the public, still it may be definite as to time."

The last case upon this subject is that of *The Marquis of Stafford v. Coyney* (b). It was decided upon another point, but the Court in their judgment alluded to the power to make a partial dedication. The Marquis of Stafford, at the request of several neighbouring proprietors, and by agreement with them, opened a road to the public; stipulating, however, for a prohibition of the carriage of coals through his estate. About a year after the road was completed, the plaintiff caused posts and a chain to be erected; and several instances were proved, in which a servant of the plaintiff had, by the directions of his agent, stopped coal-carts passing along that part of the

(a) 2 M. & S. 262.

(b) 7 B. & C. 257.

road. One question was, whether the law would allow of such a restricted dedication. *Per Bayley, J.* "If in law there can be a partial dedication of a highway to the public, it seems to me that the road in question was so dedicated. I am disposed to think that there may be such a dedication; but if not, then in this case there was no dedication at all." *Per Holroyd, J.* "In principle I see no objection to a partial dedication; and, at all events, the right given cannot be more extensive than the gift imports. If a restriction cannot by law exist as to a public way, then the grant was only a licence revocable." *Per Littledale, J.* "I entertain some doubt as to the possibility of making a partial dedication."

With such a dearth of authority, and such contradictory opinions in the little which does exist, it is a hazardous task to conjecture what would be the judgment of the Court, were the question of a partial dedication to require their decision. It does appear, however, to be most in accordance with the general doctrine of dedication and with the nature and requisites of a highway, to deny the power to make a partial dedication to the public; or rather to say, that under such circumstances the way would not be a highway. Yet it is impossible to speak confidently upon this subject, as the whole doctrine of dedication, being in its very nature only an inference of intention, is the most confused and uncertain of all the law upon highways.

By a partial dedication it is to be understood, that the way is restricted, as to the right of particular persons or classes of persons to passage over it; as where, in *Roberts v. Karr*, it was contended that the street was dedicated to foot-passengers, although carriages were clearly excluded; or as in *The Marquis of Stafford v. Coyney*,

where it was attempted to establish a right of passage for all carriages, except alone those laden with coals: and it is not meant to express by these terms, that the right of the public is limited merely in point of time. For that such a limitation may exist is decided by *Rex v. The Inhabitants of the County of Northampton*, and cannot here be disputed. But between these two kinds of restriction there is an obvious distinction. In the one all the public are placed upon an equal footing. Whenever the way is open, it is traversable alike by every body, and, during the time of its user, it is in every respect a public way. In the other case some particular class is excluded. The restriction operates, not against the public at large, but against a select portion of them; and, *vice versa*, it is in favor of a part only that the benefit is conferred.

It must be remembered that a dedication is the implication of a grant; and of course there must be a grantor and a grantee. These two parties are represented by the owner of the soil and the public. There is no doubt that a grant of a private right of way may be made under any restrictions or conditions, which may be agreed upon between the parties. They are both private individuals, and either of them has full liberty and power to stipulate for such terms as to him shall seem proper. But although in the instance of the dedication of a public way there are also two parties, the donor and the public, yet the former of these alone possesses a contracting power, or has the means of entering into stipulations. It is difficult to see how the public can agree to a diminution of their rights, or accept a restricted right. Who can enter into an agreement, to be binding on the part of the people, that they shall all be liable to maintain the road, but that a part of them only shall be at liberty to use it? Where is the authority by which the selection of those,

who are to receive the benefit, is to be made? If one class may be excluded why may not another? And still another? In one of the cited cases all coal-carts were prohibited from passing: suppose the same restriction were to be placed upon all other carriages, excepting (say, for example) those which were loaded with corn. In such a case, if the dedication were established, a tax would be laid upon the public to maintain the private road of the corn-dealer.

Again.—It was stated at the commencement of this Chapter, that to render complete the dedication of a highway, there must be the consent, either express or implied, of both the grantor and the grantee. Now it may it may be asked whether the public can, by any implication, be considered as consenting to such a restricted right of way, as that now under consideration. Perhaps it will be answered that their user of the way subject to the restriction is evidence of such consent. But how can an acquiescence on the part of the public at large be implied from circumstances which affect only a limited number of them. Where the way is wholly closed at stated seasons, and the privilege is accepted upon such terms, all those are privy to the exclusion, who can ever benefit by the right, or be subject to the consequences which flow from it. But where a part only are refused permission to traverse the way, the very allowance of that privilege to the others negatives their assent to the exclusion of the former; or even if their knowledge of the restriction, and their consequent acquiescence in it, is at all events to be presumed, still no evidence can be produced of consent on the part of those who are excluded. It should seem, therefore, that there cannot be a partial dedication of a highway, inasmuch as there cannot be a partial assent on the part of the public.

But further, one of the essential properties of a highway is excluded by a partial dedication. A highway is "any thoroughfare which is open to all the king's subjects." If the way be not open to all the king's subjects, it cannot be deemed a highway. For this reason a church-path cannot be a highway, because it is only *pro parochianis*. And the whole question as to a thoroughfare turns upon the point, that where none exists, there the way cannot be open to all the people. The reason of this distinction between public and private ways depends upon the liability to repair. Where all partake of the benefit, it is just that all should contribute to the maintenance of that from which the benefit arises. Therefore the parish shall repair highways, because they are open to all the king's subjects. And for the same reason, the parish shall not maintain private ways, however extensive the use of them, because they are not open to all the king's subjects. In the case of a partial dedication of a way, some of the public are excluded from the use of it; and as the benefit received is not general, neither shall the liability attending it be general. The parish shall not be charged with its repairs. Consequently the way in question cannot be a highway. If the *locus in quo* in the case of *Marquis of Stafford v. Coyney*, were to be considered a highway, the occupiers of coal mines might be rated to the repair of a road, from the use of which they were arbitrarily excluded.

No doubt the proprietor of the soil, upon throwing open a new road, may stipulate that certain persons shall not pass over his land; and if he use the necessary precautions, he may maintain his right to exclude them. But so long as he exercises this dominion over the way, it seems repugnant to the whole law regarding highways, that he should be enabled to free himself from the charge

of its maintenance. The way is, in such a case, a private one; and the owner of the soil may, so far as he is unrestrained by his own grant, prohibit, after notice, all or any passage whatever. For any obstruction therein, the proper remedy will be by action on the case: and the parish shall not be burthened with its repair.

If the 'origin of the way be shewn to be inconsistent with the claim of the public, as if the road be proved to have been made for the express purpose of an occupation road only, the public right is rebutted and cannot be sustained.

In the before-mentioned case of *The Marquis of Stafford v. Coyney* (a), which was an action of trespass, it appeared in evidence that several persons residing at Lane End, being anxious to open a communication between that place and Weston Coyney, sent a petition to the plaintiff (who had lands lying between those two places) for his concurrence. The plaintiff's agent wrote in answer "It must not be forgotten that Lord S.'s estate through which the projected road is wished to be carried, is full of coals open to the market, and in course of being worked.— Under these circumstances, his Lordship considers the conveyance through this estate, of coals belonging to other proprietors, to be quite inadmissible; and if any road is opened, he will expect that a prohibition of the carriage of such coals through his estate shall be part of the plan. It will, of course, be understood, that Lord S. considers the other land-owners fully entitled to lay the same prohibition on the conveyance of coals through their estates, which it appears necessary to stipulate for

(a) 7 B. & C. 257.

in his own case." (a) A communication, signed by several inhabitants of Lane End, saying that they should be glad to have the road made upon the terms above-mentioned, was afterwards sent to the plaintiff's agent. The road was accordingly commenced; that part of it which ran through the plaintiff's estate was made by him at his own expence, the residue was made under the superintendence of the surveyor of the highways, and paid for by subscription. None of the other land-owners insisted upon any prohibition as to coal-carts passing through their estates. The road was completed and opened to the public in October 1820. About a year after the plaintiff caused two posts to be erected, one at each side of the road running through his estate, and to one of these a chain was attached. Several instances were proved, in which a servant of the plaintiff had, by the directions of his agent, stopped coal-carts passing along that part of the road, by putting the chain across it. On the part of the defendant, many instances were proved, in which coal-carts had passed along the road in question without interruption, and it did not appear that carts or carriages of any other description had ever been interrupted. It was also proved, that the plaintiff's steward, when applied to on the subject of repairing this part of the road, replied, that Lord S. would having nothing more to do with it, and that the parish might repair it or suffer it to be indicted. It was afterwards repaired at the expence of the parish, and statute duty was done upon it. Upon this evidence the Court held, that the way was not (absolutely at least) dedicated to the public.

(a) Why should they be confined to the *same* restriction? One man who grew corn, might stipulate for its exclusion, another

might object to the carriage of turnips, and so on, until the road would be nearly useless.

Two of the Judges seemed to think, that there might be a partial dedication of a highway, and that this was such. But they all agreed in the right of Lord S. to bring his action of trespass, as there was not any evidence of a general dedication.

Thus also in a late case, arising upon a presentment for non-repair, it appeared that the road in question was originally made under the provisions of a local Act, passed 41st Geo. 3d. By a clause in that Act, the Commissioners were directed to set out two specific private roads therein particularly described, which, when set out, were to be used by such persons only as were entitled to use an old occupation-road, running in the same direction with the latter of the two roads. The Commissioners acting in execution of this power, by their award dated June 27th, 1803, set out the road in question as one of these two roads. From the date of the award, however, until the finding of the presentment, the road had been used by the public without interruption, as a carriage way. The question was, whether, under these circumstances, this was a public road which the parish was bound to repair. And it was decided, that this enjoyment of the way by the public, was not sufficient to constitute it a highway, the presumption to that effect being rebutted by the evidence of the award: Abbott, C.J. observing, "It was in this case, as appears from the clause in the local Act, compulsory on the owner of the soil to permit a qualified passage, viz. to all persons entitled to use the old occupation-road. That circumstance distinguishes this from the cases cited. If this be a public road, it would follow that, wherever under an Inclosure Act an occupation-road was set out, and it happened to be convenient for passage, it would become almost immediately a public road,

and the burthen of repairing it would be thrown on the parish." (a)

Another rule which frequently defeats the claims of the public, is that the owner of the fee can be bound only by his own act; and that, therefore, if the *locus in quo* has been in lease during the time of the usage thereof by the public, his right will not be lost through the act or neglect of his tenant, as his assent cannot be implied from the acquiescence of his lessee.

The case of *Wood v. Veal* (b), is a very strong decision upon this point. It appeared in evidence, that as far back as living memory could go, the *locus in quo*, which was called Little Abingdon Street, Westminster, had been used by all persons desirous of going there; and that in the 11th Geo. 3d. it had been enumerated amongst other streets, in the Act of Parliament then passed for paving, cleaning, and lighting the squares, streets, &c. of Westminster, That the Commissioners had recently paved and lighted it, and that watchmen had been stationed there. On the part of the plaintiff it appeared that, in the year 1719, a lease for ninety-nine years of the plaintiff's premises, including the yard in dispute, had been granted by the then owner of the fee, which having expired in 1818, the plaintiff, in 1820, having for *twenty-four years* previously lived in the neighbourhood, erected a fence across the street, which caused this action. The *Lord Chief Justice (Abbott)* left it to the jury to say whether they thought there had been any dedication to the public *previously to 1719*; telling them

(a) *Rex v. Inhabitants of St. of the Parish of Enfield*, cited 2 Benedict, Cambridge, 4 B. & A. Burn's Justice, 821, (24th edit.) 447.—See also *Rex v. Inhabitants* (b) 5 B. & A. 454.

that in that case they ought to find for the defendant; but if not, then he told them, that there could be no dedication to the public, except by the owner of the fee; and that the permission by the tenants for ninety-nine years could not bind the landlord; and that the circumstance of the lease for ninety-nine years, which had been proved, explained in a great degree the use by the public, as not being referable to a dedication by the landlord. Under this direction the jury found a verdict for the plaintiff. And upon motion for a new trial, the rule was refused, all the Judges considering, that the direction to the jury was good law, and properly given.

But it is decided, that if there hath been a frequent change of tenants, during the period when the public have had the use of the way; or if the landlord be proved to have had *express* notice of the public being in the occupation of the way, his consent, as owner of the fee, must be implied, and the dedication will be complete.

Such was the case of *Rex v. Barr (a)*, which was an indictment for stopping up a public footway leading from Stoke Newington to Islington. The way passes over land which belongs to the Marquis of Northampton. It was proved to have been used by the public for upwards of fifty years. During the whole of that time, the land had been occupied by a succession of tenants. One of these frequently complained to Lord Northampton's steward, that the public used the footway, whereby the land was injured; but no action was brought either by the landlord or tenant against any one who used it. The defendant had lately taken a lease of the land over which the way

(a) 4 Campb. 16.

passes, and inclosed it with a wall. His Counsel contended, that the above facts did not establish a public right of way over the *locus in quo*, as the user proved had been exclusively during the occupation of successive tenants, whose acquiescence could not bind the reversioner; and that there was here no evidence of a dedication to the public by the landlord, who alone had power to dedicate. But the defendant was found *Guilty*; and *Lord Ellenborough*, C. J. observed, that "After a long lapse of time, and a frequent change of tenants, from the notorious and uninterrupted use of the way by the public, I should presume, that the landlord had notice of the way being used, and that it was so used with his concurrence. In this case, however, we have express evidence of notice; for notice to the steward was notice to the landlord."

I shall just add a case, which occurred at the Yorkshire Summer Assizes, 1823, which is illustrative of this question, with regard to the extent of notice sufficient to bind the landlord. The facts of this case (a) were as follows:—The closes over which the supposed road led, were formerly common-fields; and the whole of the township was the property of Mr. Duncombe, who inclosed the open-fields, without any Act of Parliament, at different times in the years from 1804 to 1809. Over the common had been various tracks, along which the inhabitants of the neighbouring villages had been accustomed to pass; and on the inclosure Mr. D. set out the road in question, and had it thrown up by his tenants, under the direction of the surveyor of the township. But as the whole of the township belonged to Mr. D., he had the absolute appointment of the surveyor, who may be con-

(a) *Duncombe v. Smith*, M. S.

sidered as his servant; and Mr. D. had the sole ordering as to the repair of the roads, and of course might have all the roads, private as well as public, repaired as he should think fit. The way in question was of use to the occupation of several of Mr. D.'s farms, for carrying lime and for other purposes; but it seems to have been used by other persons without interruption from the inclosure till 1822. But, notwithstanding that during the whole time it was in a very bad state of repair, no indictment was ever sought to be presented for the non-repair thereof. Moreover, during the whole of the period up to 1822, the lands were in lease, to a man named Sigworth, and after his death to his son; and when Mr. Duncombe came into possession of the farm in 1822, he erected the obstruction, the removing of which was the alleged trespass. The plaintiff did not oppose the claim to a footway, but maintained that there was no right to a carriage road; under both of which ways the defendant had justified. But, notwithstanding the leases, and the other circumstances above mentioned, it was held, that the length of possession by the public *with the knowledge* of the plaintiff, was sufficient evidence of a dedication by him to the public. In which decision his Counsel (one of whom was Sir James Scarlett) fully acquiesced; and no attempt was made to set aside the verdict.

Where the right of soil is in the Crown, the *express* consent of the Crown must be obtained, to establish a public right of way; or in other words, a dedication cannot be implied as against the Crown. This, at least, seems to be the only principle, upon which the argument of Mr. Justice Bayley, as to the point of dedication, in the case of *Harper v. Charlesworth* (a), can be reconciled

(a) 4 B. & C. 574.

with other authorities; for it can hardly be said, that the *locus in quo*, in that case, was *in lease*; the plaintiff being merely an occupant *at will*, who was not possessed of the smallest title as against the Crown, not even a lease from year to year.

I come now to the second point, viz. How far the consent of the public is requisite, to complete the dedication. This consent is, in general, the foundation of the proceeding, as the question arises upon ACTUAL USER by the public. And so far the subject involves little difficulty. But roads require to be kept in good repair, and therefore, more depends upon the question of dedication, than the mere right of the public to pass along the way; I mean, who is to be at the charge of its maintenance. If the dedication be established, the public ought certainly to pay the expences of the road, of which they have obtained the benefit. But is the parish to be obliged to repair every way, which may be thrown open to the public, and which might often be purposely opened by the owner, in order to relieve himself from the expence of repairing? Is the parish to have no voice in the matter—no means of refusing the obnoxious gift? I find no cases which are decisive upon this point. One great difficulty which occurs, is as to the mode by which the election and consent of the parish can be testified.

Mr. Justice Bayley has made some observations upon this question in the case of *Rex v. The Inhabitants of St. Benedict, Cambridge*(a). He says, "I do not accede to the doctrine, that because there is a dedication of the road by the owner of the soil and the public use

(a) 4 B. & A. 447.

it, that the parish is therefore bound to repair. I think there ought to be, in addition to that, evidence of an acquiescence by the parish in that dedication. In the case of bridges, there always is what is to be considered as an acquiescence by the county. The county is not liable except for bridges made in highways; the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance (a), and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way, is an acquiescence by the county in the building of the bridge. But in the case of a parish, they have no power to prevent the opening of a road, or to obstruct the public use of it. It would be most unjust, if by the public use of what was at first a private road, the burthen of repairing it could be removed from the persons to whom the use of it was at first confined, and cast upon the parish. Admitting, therefore, that in this case there was a dedication to the public, and that the road was found to be a public benefit, (which I am not sure is the case) I think that, in consequence of the want of some act of acquiescence or adoption by the parish, they are not liable to the repair of the road."

It is not easy to see, how we can separate between the consent of the public and the concurrence of the parish. All highways are for the benefit of the people at large, in whatever part of the kingdom they may inhabit. And though each parish is bound to repair its own ways, yet the burthen is the same upon all other parishes; and there seems no reason why any one of them should be

(a) But, for this purpose, it cannot indict a bridge, which is of public utility. must be a nuisance. The county

allowed a *veto* as to the establishment of new ways, which, in the very user thereof by the public, are evidenced to be of general advantage. If a way be voluntarily traversed by the people at large, it must be presumed to be beneficial to them; if it be of benefit, the law justly charges the parish with its reparation. It is almost a contradiction in terms, to say that the parish can dissent from a way, which the public have appropriated. The principle, upon which the liability to repair is founded, is, that *the public* shall be at the expence of keeping in good order their own ways. The parish is selected only as the *means* whereby that charge can be effected. Wherever a way is become a public way, then the parish must maintain it, as the agent for the people. Therefore, the intervention of the parish, as a parish, is not until after the public nature of the way is established. That is done through its adoption by, and, as a necessary consequence, its utility to, the people at large. Upon principle, then, the concurrence of the parish is not requisite; and in practice it is difficult to see how its dissent could be made manifest.

Mr. Justice Bayley instances the case of bridges; and argues, that as the county has a power of indicting a newly-erected bridge, so the parish should have the privilege of negating the dedication of a highway. The two cases, however, are by no means parallel. A public bridge is that which is erected in a highway; if it be not required, its erection is an obstruction of the way, and may be indicted; if it be beneficial, the county shall repair it. But under all circumstances, the passage over the bridge is a matter of necessity, not of choice. No one can traverse the highway without passing along the bridge; and it follows, that its user by the public is no evidence of their consent to its erection, nor any criterion

of its utility. But if a bridge *be of public utility*, and be used by the public, they *are obliged* to repair it, though built by an individual: *aliter*, if built by him for his own benefit, and so continued, without public utility, though used by the public. And if a bridge built by an individual, and dedicated to the community, is not what it seems to be, but is of imperfect and inartificial construction, the public may reject and indict it for a nuisance, after discovering the cheat, though their previous conduct might, under different circumstances, have amounted to an acceptance (*a*). And if a bridge is thrown over a highway, and the public derive no benefit from it greater than they enjoyed before it was built, the builder is bound to repair it (*b*).

But very different from that of a bridge is the situation of a highway. No necessity exists to compel the people to the use of it. Their adoption of it is an act purely voluntary; and instead of being a doubtful criterion of its utility, is a decisive proof to that effect. The different nature of the evidence required, then, is the sole cause of this distinction between highways and bridges. If a bridge be of public utility the county cannot refuse to maintain it, neither can they indict it; if a highway be of public utility, the parish must repair it. But in the one case the fact of the benefit derived, is proved by the very act which brings the way into existence; whereas, in the other case, additional evidence is required.

Mr. Justice Bayley appears to have argued from the defenceless situation of the parish. If, however, the

(*a*) *Rex v. The Inhabitants of West Riding, Yorkshire*, 2 East, 342.
 (*b*) *Rex v. Kerrison*, 3 M. & S. 526.

common law be defective in the protection afforded to the parish, its deficiency is supplied by the late Highway Act(*a*), which provides for the extinction of such highways as are not of general advantage.

SECONDLY.—Highways may be created by Turnpike Acts, Inclosure Acts, or other Acts of Parliament, containing specific enactments for such purposes(*b*). The quality of these ways must, of course, depend upon the nature of the enactments, in the respective Acts by which they are brought into existence.

The provisions contained in any such Act, must be strictly complied with, before the way can be established, or the liability to repair it be enforced. Therefore where notices were required to be given, but appeared not to have been given, the proceeding under the Act was held to be invalid(*c*).

In one case(*d*), a railway was made under authority of an Act of Parliament, by which the proprietors were incorporated; and by which it was provided that the public should have the beneficial enjoyment of the same. The Company having determined to render one branch of the rail-road impassable, caused the iron tram-plates thereon, for a space of several hundred yards, to be taken up, and thereby destroyed that branch. An application was thereupon made to the Court of King's Bench, for a *mandamus* to compel the Company to re-instate the

(*a*) 55 Geo. 3. c. 68. See post, Chapter V.

(*b*) See Sutcliffe v. Greenwood, 8 Price, 535.

(*c*) Rex v. The Inhabitants of

Haslingfield, 2 M. & S. 558.

(*d*) Rex v. The Severn and Wye Railway Company, 2 B. & A. 646.

ways in general, and peculiar statutory provisions have been passed for the regulation of public bridges. Therefore although, as in all other respects the law with respect to highways in general and public bridges is the same, what is laid down in the other parts of this Treatise is equally applicable to both, such a union is not feasible upon the question of repair; and in the present Chapter, they must be separately discussed.

SECTION I.

The law of repair, as it regards highways in general.

For the purpose of solving this part of our subject, a further analysis will be necessary; and we must treat of 1st, The general common-law liability to repair: 2dly, The liability of those who are bound to repair by reason of inclosure, or by prescription: and 3dly, The statutory provisions relating to the subject; which may be said to be supplementary to the common law.

•FIRST.—As to the general common-law liability to repair.

It seems to be agreed that of common right, that is, by the common law, the general charge of repairing all highways lies on the occupiers of the land in the parish, wherein they are (*a*). Thus Mr. Justice Twisden decided (*b*), that every parish of common right ought to repair the highways; and no agreement with any person whatever can take off this charge, which the land lays upon them. And this is fully confirmed by Lord Hale, in *Austin's*

(*a*) 1 Roll. Ab. 390.

(*b*) 1 Ventr. 90.

Case (a). See also *Rex v. Inhabitants of Marton (b)*, where it is laid down, that of common right parishes are bound to repair.

Therefore in the case of *Rex v. The Mayor, &c. of Warwick (c)*, in which the defendants were indicted for not repairing the way to a church; and the indictment did not set forth how they became liable, but only that they ought to repair; it was held naught, because *prima facie* and regularly the parish or county ought to do it of common right.

An indictment for non-repair must always be laid against the parish generally; and when one was brought against the overseers, it was quashed; the overseers not being bound to repair the ways, but only to give notice to the parish to come and repair them (*d*).

In *Rex v. The Parish of Ragley (e)*, Lord C. J. Holt said, "The parish of common right ought to repair their highways; but by prescription one parish may be bound to repair the way in another parish."

It has been laid down, that the parish is liable to be indicted only if the road be *out of repair*; for it is no indictable offence, that the road is very muddy, and so narrow that people cannot pass over it without danger of their lives, unless it also adds, that it is out of repair (*f*). In opposition to this principle, it was said by Lord

(a) 1 Ventr. 183, 189.

(b) Andr. 276.

(c) 2 Show. 201.

(d) *Rex v. Dixon and Hollis*,
12 Mod. 198.

(e) 12 Mod. 409.

(f) *Regina v. Inhabitants of
Stretford*, 2 Ld. Raym. 1169.

Kenyon (*a*), that the same persons who are liable to repair a public bridge, will be also liable to widen it, if the exigencies of the public should require an enlargement of the road. But, as we shall see in the 3d section of this Chapter, this *dictum* has been over-ruled by a later decision.

So strong and binding is the liability of the parish to repair their highways, that if others, before liable, become unable to effect the repairs, and so the discharge, which was interposed between the parish and that liability is withdrawn, the old burthen revives. This was decided by Lord C. J. Holt, in the case of *Young v.* — (*b*), where he said, that the inhabitants of every parish of common right ought to repair the highways; and, therefore, if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the Justices of Peace may put that charge upon the rest of the inhabitants.

Upon the same principle, upon which the burthen reverts to the parish when those persons who are bound by prescription or otherwise to repair the ways, are *not able* to effect such reparation; the common-law liability re-attaches upon the parish, when an inferior district, which has been accustomed to maintain its own ways, is

(*a*) *Rex v. Inhabitants of Cumberland*, 6 T. R. 194.

(*b*) 1 Ld. Raym. 725—and see *Rex v. Inhabitants of Oxfordshire*, 4 B. & C. 194—which was the case of a bridge, built by trustees under an Act of Parliament; and yet the county was considered as bound to repair.—And all the

Judges agreed, that even if there were an auxiliary fund, yet the county would be chargeable, and must have their remedy over against the trustees. It may here be observed, that the *principles* relating to bridges are, in general, *analogous* to those which apply to highways.

exempted from the repair of a particular road within its boundary. This point was decided in *Rex v. The Inhabitants of Sheffield* (a). The case was shortly this. The inhabitants of the township of Sheffield had immemorially been accustomed to repair their own highways. But they were expressly exempted by an Act of Parliament from the repairs of the way in question, which was a new road set out under the provisions of that Act. It was argued on behalf of the parish of Sheffield, that where the inhabitants of a township have been, from time immemorial, bound to repair the ways which run through it, such a custom is equivalent to the common-law right by which parishes are bound to the repairs in other places; and renders that township liable to all the consequences which flow to a parish from the common-law obligation. The judgment delivered by Mr. Justice Ashhurst, in favor of the township, is so well deserving of attention, and so clearly delineates the principles of the law upon this subject, that I shall make no excuse for transferring it to these pages. He observed, "The question is whether the inhabitants of the *parish* of Sheffield are bound to repair a road lying in the *township* of Sheffield. This doubt arises on an Act of Parliament passed in the 19th year of this reign. Before the passing of this Act the township used to repair all the highways lying within their district; but in this Statute there is a particular proviso, by which it is enacted, 'That no person or persons dwelling within the township of Sheffield shall be liable to perform any statute work in repairing that part of the road leading through Sheffield Park, or contribute any money towards repairing the same.' This being the case, the question is, whether or not the rest of the

(a) 2 T. R. 106.

parish are bound to repair? Now it is an incontrovertible position, that by the general law of the land the parish at large is *prima facie* bound to repair all highways lying within it, unless by prescription they can throw the *onus* on particular persons by reason of their tenure: but when that is the case, it is by way of exception to the general rule. It was argued at the bar, as if a parish was only bound to repair by a particular custom, whereas it is a common-law *onus* for the public benefit; and, therefore, where no other persons are bound to repair, the parish must do so *ex necessitate*. This manifestly appears from the different forms of indictments, against the parish in general, or a township in particular. In the former there is no other allegation, than that the road lies within such a parish, and that the inhabitants of it are bound to repair. But when the indictment is against a township, or particular persons, it must allege, that from time immemorial they are bound to repair; which shews that the particular allegation is not necessary, where they are bound by the general law. If nothing had been said in this Act of Parliament about the repair of the roads, excepting that they should afterwards become highways to all intents and purposes, the *onus* of repairing must by operation of law have fallen on the parish at large (a). But inasmuch as the township is exempted from this burthen by the express words of the Act, it must necessarily fall on the rest of the parish. Perhaps this was not in the contemplation of the Legislature at the time of passing this Act; but we do not go on the intention of the Legislature. They have expressly

(a) Not on the parish but on the township—the latter being quasi a parish. This very point

occurred, and was decided in *Rex v. The Inhabitants of Netherthong*, 2 Barn. & Ald. 179.

enacted that the township shall not be liable; and therefore the rest of the parish must be so *ex necessitate*."

The obligation upon the inhabitants of the parish to repair their highways is so conclusive, that an indictment stating that particular persons ought to repair, without averring a special cause for charging them, is bad. It must shew *how* they are bound; and it is not enough to shew that they immemorially ought to repair; it should be shewn that they have repaired (*a*).

The parish cannot, by any act of their own, relieve themselves from their responsibility to the public, for the maintenance of the highways within their limits. Accordingly it has been decided, that *no agreement* with any person for the making of the repairs, can exonerate the parish from their own common law obligation: and that an indictment against an individual or a corporation for not repairing a highway, which by virtue of a certain agreement they are bound to do, is bad (*b*).

And where a statute enacted, that the paving of a particular street should be under the care of Commissioners, and provided a fund to be applied to that purpose; and another statute which was passed for paving the streets of the parish, contained a clause, that it should not extend to the particular street. It was held that the inhabitants of the parish were not exempted from their common-law liability to keep that street in

(*a*) *Rex v. Inhabitants of Great Broughton*, 5 Burr. 2700; and see *Rex v. Inhabitants of Penderryn*, 2 T. R. 513.—*Rex v. Inhabitants of Mile End, Sty.* 163; and *Re-*

gina v. Scott, 2 Lord Raym. 922.

(*b*) Per Twisden, J. 1 Vent. 90, and *Rex v. The Mayor, &c. of Liverpool*, 3 East, 86.

repair; and that the duty of repairing might be imposed upon others, and the parish still be liable; and that the parish was under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the Commissioners (a).

The strongest instance which exists, as to this *prima facie* liability of the parish, is, where a highway has been converted into a turnpike road and placed under the management of trustees, with a power to collect tolls to be applied to the repairs; in which case it is decided, that if the way be out of repair, the parish (or township, as the case may be) are the *only* persons who are liable to be indicted, and must seek their remedy over against the trustees. In the case alluded to (b), the Local Turnpike Act, for diverting, altering, widening, *repairing and amending* the road in question, enacted, that the lands &c. purchased by the trustees should be made use of and converted into and be made part of the said road, in such manner as the trustees, or any seven or more of them, should think convenient and proper. And that the lands, so to be converted into and made part of the said road, should be sufficiently ditched and fenced out for that purpose, *and from time to time repaired out of the money arising by virtue of that Act, by such person or persons as such trustees, or any seven or more of them, should order, direct or appoint*; and that the new road should to all intents and purposes from thenceforth become and be deemed and taken to be a public highway. The Act contained a proviso that

(a) *Rex v. The Inhabitants of Saint George, Hanover Square*, 3 Campb. 222.

(b) *Rex v. Inhabitants of Ne-*

therthong, 2 Barn. & Ald. 179; and see *Rex v. Inhabitants of Oxfordshire*, 4 B. & C. 194, and ante, page 72, note (b).

nothing therein should be construed to be a discharge of any county, parish, township, &c. from the performance of statute work upon, or otherwise repairing any road, bridge, &c. which they or any of them respectively had been accustomed, or of right ought to repair, by reason of the tenure of any lands, or by ancient usage or otherwise, but that all and every such road, bridge, &c. should thereafter be kept in repair by such county, parish, township, &c. as theretofore the same respectively had been kept in repair. The township were bound by prescription to the repair of their highways. But it was contended that the trustees were liable under the provisions of this Act in exemption of the township; or at any rate, that the parish, and not the township, ought to have been indicted. *Sed per Abbott, C. J.* "By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway. And the same rule extends to county bridges; for the statute which passed to limit the liability of the county to those cases only where the new bridge is substantially built, shews sufficiently that, by the common law, they would otherwise be liable to the repair of all new bridges which might be erected within their district. Then, in this case, there is a new highway brought into the township of Netherthong. And it follows that the inhabitants, who by the prescription stated in the case, are in effect placed in the same situation as that of the inhabitants of a parish, are liable to the repairs of this new highway. And the proviso in the Local Turnpike Act expressly says, that nothing therein contained shall exempt them from the liability which belongs to them. Then, can the clause which binds the trustees to repair make any difference. It is strange, if the trustees are liable, that

in the multitude of Turnpike Acts, almost all of which must contain similar provisions to the present, no case has yet occurred of any indictment being preferred against persons in that situation. I think, therefore, that the trustees are not liable by way of indictment, and that the only persons who are so liable are the present defendants." And *Bayley*, J. observed, "I think that the tolls in this case are only an auxiliary and subordinate fund, and that the persons whom the public have a right to hold liable are the inhabitants of the township, who may afterwards apply to this Court for relief, under the 32d clause of the General Turnpike Act."

I shall just mention in this place, as a consequence from this common-law liability of the parish to repair their ways, that, if they can throw the burthen upon any others, it must be done by a *special plea*; for under the plea of *Not guilty*, they can only prove that the way is in good repair; since, as they are chargeable *de communi jure*, if they would discharge themselves by laying it elsewhere, it must be pleaded (*a*).

As to an extra-parochial hamlet.—We have seen that a parish is *primâ facie* liable to repair all the highways running through it; but that a township, *being part of a parish*, may, by prescription, become chargeable for the maintenance of all the highways within its boundary (*b*), in which case any indictment against the township must state specially, not merely that they ought to repair, but that they have been immemorially accustomed to repair. There remains to be considered the peculiar instance of

(*a*) See 1 Ventr. 256.

(*b*) See post, page 93, where the liability by prescription, its na-

ture and obligation, are particularly noticed.

an *extra-parochial hamlet*. As there is, in this case, no parish, the general common law charge cannot avail—and the question arises, whether the common law would substitute a rule to enforce upon the hamlet that liability, which in other cases attaches upon the parish. This point arose in *Rex v. The Inhabitants of the Extra-parochial Hamlet of Kingsmoor* (a), but, unfortunately, owing to a *mispleader*, was not there decided. The indictment charged the way in question to be an ancient king's highway, used for all the king's subjects; and that a certain part, *situate in the extra-parochial hamlet of Kingsmoor*, in the said county, therein described, was out of repair; and that the inhabitants of the extra-parochial hamlet of Kingsmoor the said common highway ought to repair and amend. *The Court* held, that it should have been shewn on the face of the indictment, that the hamlet of Kingsmoor neither formed part of, nor was connected with any other larger district, the inhabitants of which were liable to repair the road in question. That not being stated, the general question was not raised, but the point was argued by the Counsel for the prosecution. It was contended that, upon principle, the inhabitants of an extra-parochial district ought to be charged with the burthen of repairing. It is clear that the inhabitants of a parish are liable, not by particular custom, but of common right. Now the common law obligation must have existed before the ecclesiastical division of the kingdom into parishes took place. Before the existence of this ecclesiastical division, the inhabitants of some known district must have been liable to the repair of the roads; and if any such district were not then included in the division of the kingdom into pa-

(a) 2 Barn. & Cress. 190.

ishes, the liability to repair the roads, situate within it, remains as it was before. 27 *Liber Assisarum*, 44 (21) was cited to shew that the inhabitants of a vill were formerly liable at common law to the repair of roads. And a hamlet and vill are synonymous (*a*). A hamlet is, therefore, a division of the kingdom recognised by the law. A special custom may be alleged within it (*b*); and it is mentioned as a known district in the statute 27 H. 8. c. 25. The inhabitants of such division, if extra-parochial, must be liable to repair as of common right, both upon principle and authority; and if so, it cannot be necessary to allege immemorial usage to repair. The older authorities shew that a vill is liable at common law, and therefore that it is not necessary to allege an immemorial liability. To this argument Best, J. addresses his observations. He says, "It is not necessary to consider whether the civil division of the kingdom is more ancient than the ecclesiastical, inasmuch as it clear that the latter took place before the time of legal memory, and it is indisputable that the common law has thrown the burthen of repairing roads on parishes. If you proceed against any other district, you must not only allege, that the inhabitants of such district are bound to repair, but you must shew from what the obligation to repair arises, viz. that they were bound by custom or prescription. The cases in which this has been decided have been, where it has been attempted to throw the whole burthen of repairing roads on particular divisions of a parish, such as townships, instead of the entire parish. Those cases may be said not to apply to that which is now under consideration, because here there is no parish on which

(*a*) *Rex v. Morris*, 4 T. R. 550,
and *Rex v. Walbeck*, 1 Bott, 38.

(*b*) *Co. Lit.* 110 (*b*).

the charge can be thrown, the hamlet in which the road is situated being stated to be extra-parochial; but they are authorities which answer the argument, that the common law imposes the burthen of repairing on districts included within the common-law division, and not such as belong to the ecclesiastical division. I can find no authority for saying that any thing but a parish is to be charged. If the law authorizes no charge except on parishes, places that are extra-parochial are not, by the general rule of law, liable. But there will be no difficulty in compelling the repair of old roads in such places. These roads must have been repaired by somebody; and proof of such repairs under an indictment, properly charging them, will oblige the persons who have repaired them to continue to do so."

With all deference to the authority of so learned a Judge, it may however be doubted, whether in the above observations his arguments are conclusive, or his opinion the one which is likely to be adopted in future cases. Supposing, in any general alteration of the law, certain places are exempted from the operation of that change, and the former law is not expressly repealed as to those places, it is evident that they must remain exactly as they were before. It is therefore a weighty plea, that vills or hamlets were liable, before the existence of parishes; and that, when by the formation of parishes, a new law was applied to that part of the country which went to make such parishes, yet all extra-parochial places will be unaffected by the innovation, and must be liable to the former law. And his Lordship's reasoning about the difference with respect to parishes and townships seems hardly to apply. It is not denied that the general common-law liability attaches upon the parish—but this can be only where there exists a parish. Being none, we still

wish to ascertain what is the *common-law* liability. Nor do I see any reason why we should not recur to the state of things before the time of legal memory, to discover what must have been the rule of law at that period, and thence to deduce it up to the present time. To compare this case with that of a township situate within a parish, and to require the same form of indictment to be pursued in both instances, is obviously incorrect. There, the liability is an exception to the general law—here, it is a distinct and original rule of law. There, as it has been said, the obligation is against common right—here it is in the strictest analogy with, and may be considered as forming a part of, the common law. Notwithstanding Mr. Justice Best's advice how to avoid the difficulty by pleading a *custom to repair* (a), it must frequently happen that such a plea cannot be supported, and so often it will be necessary to advert to the point now under discussion; for where turnpike or new roads are made in, or old roads diverted from other districts into, an extra-parochial hamlet, there can have been no usage as to the repair, whereupon to charge the inhabitants of the district; and as in the former case the trustees of turnpike roads are not liable to prosecution (b), the public will have no power to enforce the repairs—if by the common law the hamlet be not liable.

Besides the argument brought forward by the prosecutor in the case of *Rex v. Kingsmoor*, a very strong one may be urged upon the principle of necessity, aided by direct analogy. The highway may be quite impass-

(a) It must be remembered, that Mr. Justice Best does not advise the plea of a general custom to repair, as in the case of a

township *within* a parish, but a special usage as to the repair of the particular road.

(b) See ante, p. 76.

able, and yet the public shall have no redress, if an indictment cannot be maintained against the hamlet. But surely the public convenience must be consulted, and if no one else can be made liable, the hamlet *ex necessitate* shall be bound to repair; and this, not in contradistinction to the common law, but in perfect unison and analogy with it. Mr. Justice Ashhurst says, the obligation upon the parish to repair is a *common-law onus for the benefit of the public*, and therefore where no other persons are bound to repair, *the parish must do so ex necessitate (a)*; and every reason which enforces it as against a parish, appears to have equal force as against an extra-parochial hamlet. It is true that Mr. Justice Best says, he can find no authority for saying that any thing but a parish is to be charged, and therefore that no other district can be liable. But before this reason can be admitted as satisfactory, it must also be shewn that there is no authority for resorting to analogy; and, where the case actually demands it, applying a remedy upon principles similar to those which are found to exist in a parallel case. Instead of this being the fact, such a mode of decision is very frequently had recourse to. In the exposition of the written law, what is more common than to adopt an equitable construction of the statute; and to do that which is within the spirit though not within the letter of the Act? And why are we to be more strict in the construction of the unwritten law, which in its very nature appears to be much more open to such a laxity of interpretation?

(a) *Rex v. The Inhabitants of Sheffield*, ante, p. 73.—And see *Rex v. The Inhabitants of Ecclesfield*, 1 B. & A. 357, where Lord Ellenborough says, "It is a general rule of the common law, that highways and bridges are (except in

certain excepted cases) to be repaired by the inhabitants of the territory wherein they are situated, as a charge upon the land within that territory, to be defrayed by the occupiers for the time being."

If we consider the mode of pleading in these cases, we shall find it to be absolutely necessary to establish the common-law liability of the hamlet. In an indictment against a parish, it is sufficient to aver that it *ought to repair*; but if the proceeding be against a township in the parish, as it is not *prima facie* bound,—as the law does not throw the burthen upon it, and therefore cannot recognise the obligation to repair *without proof*—evidence of its liability is required, and for this purpose it must be alleged and shewn that the township *has been accustomed to repair*. But in the instance of an extra-parochial hamlet, there is neither the same reason for pleading, nor the same power to prove, that it has been accustomed to repair. We must argue the case entirely with reference to a road, the obligation to repair which is now for the first time necessary to be established; and endeavour to discover the rule of law as it would have been prior to the amendment of any highway whatever. In such a case there is no room for fact, and it would therefore be absurd to call for evidence of that which has clearly never taken place. It is solely a question of law—there is no exemption from a general and existing burthen to be proved—nor can any usage have prevailed which will relieve the one party, or tend to charge the other—the sole point for the determination, is who *by law ought of common right* to repair the roads in an extra-parochial hamlet, and it follows that this point is all which the record need allege. The liability cannot be in the least degree affected by the consideration, whether the way has or has not ever been repaired; and it is putting at issue an immaterial point, to oblige the prosecutor to plead, and consequently to prove, a usage which can have no influence in deciding upon the rule of law.

We must conclude, then, that from a regard to the convenience of the public, from the necessity of the case, and from the strictest analogy, and in accordance with the principles of pleading it must be inferred, that an extra-parochial hamlet is liable by the common law to repair the highways within its boundary (a).

As to boundaries between parishes.—It may be proper to mention in this place the provisions of an Act of Parliament, which has been passed for the purpose of ascertaining the boundaries of parishes in highways, and thereby enforcing the common-law liability to repair, of which we have been treating.

By the 34th Geo. 3d. c. 64, s. 1, after reciting that it frequently happens that the boundaries of parishes pass through the middle of common highways, whereby great inconveniences have often arisen to such parishes in settling the time and manner of repairing and amending the same: It is therefore enacted, That it shall be lawful for any two justices of the peace for any county, riding, or division, upon complaint or application (b) to them by any surveyor or any one of the surveyors of the highways of any parish, (stating to such justices in writing, and by a plan thereunto annexed, that there is situated in the said parish and also in some other parish adjoining thereto, specifying the same, a certain common highway, particularly describing the same by metes, bounds, and admeasurement thereof, one side of which common highway ought to be made or repaired by one of such parishes, and the other side thereof by the other of such parishes)

(a) It is corroborative of this doctrine, that the Highway Acts speak of an extra-parochial hamlet, exactly upon the same footing as a parish. See especially the

45th sect. of 13 Geo. 3. c. 78. as to the notice required previous to the imposition of an assessment.

(b) See Form, Appendix, No. I.

to issue their summons (a), with a copy of such writing and plan thereunto annexed, to the surveyor or one of the surveyors of the highways of such other parish, to appear before them on a day to be mentioned in such summons, not more than fourteen days nor less than seven days from the date of such summons; and in case the parties shall then appear before such justices, they may then proceed finally to decide the matter in the manner hereinafter mentioned, in case all the parties shall consent thereto: but in case the surveyor summoned shall not appear on such first summons, or appearing shall require further time, the said justices shall adjourn the further consideration of the matter for any further time, not more than twenty-one days nor less than fourteen days from the day of such adjournment, of which the surveyor not appearing shall have notice; on which day the said justices shall proceed to hear the parties and their witnesses, and whether the party summoned does or does not appear, shall proceed to examine and finally determine the matter in form following: (that is to say) That it shall be lawful for such justices to divide the whole of such common highway, by a transverse line crossing such highway, into two equal parts, or into two such unequal parts and proportions, as, in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances attending the same, they, in their discretion, shall think just and right; and to declare, adjudge, and order (b), that the whole of such highway, on both sides thereof in one of such parts, shall be maintained and repaired by one of such parishes, and that the whole of such highway, on both sides thereof in the other of such parts, shall be maintained and repaired by the other of such parishes; and shall cause such their order, and a plan of such highway, and the allotment thereof as before men-

(a) See Form, Appendix, No. II. (b) See Form, Appendix, No. III.

tioned, to be fairly delineated on paper or parchment, and filed with the clerk of the peace of the county in which such highway shall happen to lie; and shall also cause such posts, stones, or other boundaries, to be placed and set up in such highway, as in their judgment shall be necessary for ascertaining the division and allotment aforesaid.

Under this clause, it should seem that a material variation between the order made by the justices and the one filed with the clerk of the peace, would be fatal to the whole proceeding, according to the case of *Rex v. The Inhabitants of Washbrook* (a). There by a private Inclosure Act, the Commissioners were directed to fix and settle the boundaries of a parish, in a certain manner therein specified, and to advertise in a provincial newspaper, a description of the boundaries so fixed and settled. The boundaries so fixed and settled were also to be inserted in the award of the Commissioners, and to be final, binding, and conclusive. The Commissioners having fixed and settled the boundaries in the mode specified, duly advertised a description of them; but the boundaries mentioned in the award varied from those which had been advertised. And it was held by the Court of K. B. That the Commissioners had not pursued the authority given by the Act, and that their award was not binding as to the boundaries of the parish.

As to the notices required to be given to the different parishes, it is probable that they will be presumed to have been duly given, if the order of the justices shall appear to have been acquiesced in: but that, if the usage has not been pursuant to the order, in such a case the service of the notices must be proved, before the order itself can

(a) 4 Barn. & Cress. 732.

be admitted in evidence. A decision to this effect has been made upon an Inclosure Act, by which the Commissioners had authority to settle the boundaries of parishes, upon giving certain previous notices to the parishes to be affected by the award. The highway in question, had never been repaired by the parish to which it was awarded by the Commissioners, but by the one which had formerly made its repairs. And the Judge refused to admit the award in evidence, until the requisite notices had been proved to have been given. And upon application to the Court of K. B. a new trial was refused, Lord Ellenborough, C. J. observing, " That the general rule certainly is, that where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shewn. But in this case there is negative evidence, viz. that the parish of H. have continued to repair, which does away the presumption that all has been duly performed, because if that were so they ought not to have continued to repair (a)."

By the 2d *Section* of the above Act, From and after such order and plan shall be so filed with the clerk of the peace as aforesaid, such parishes, and the inhabitants thereof respectively, shall be bound as of common right to maintain and keep in repair such parts of such common highway so allotted to them as aforesaid, and shall be liable to be prosecuted and indicted for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations, and penalties contained in any Act or Acts of Parliament for the repair of the highways which are or shall be in force, in like manner as they are liable and subject to with respect to the repair of any other common highway within such pa-

(a) *Rex v. Inhabitants of Haslingfield*, 2 M. & S. 558.

ishes respectively; and also shall be discharged from the repair of such parts of such highway, as shall not be included in their respective allotments.

And by *Section 3*, All costs, charges, and expences incurred shall be defrayed by such two parishes, to be ascertained by such two justices; and if not paid, either such justices, or any other justice, may levy the same by distress and sale, with the costs of such distress, on the goods and chattels of any surveyor of the highways of the parish refusing or neglecting to pay.

By *Section 4*, It is provided that nothing therein shall affect, change, or alter in any manner whatsoever, any boundaries of counties, lordships, hundreds, manors, or any other division of public or private property; nor the boundaries of any parishes, otherwise than for the purpose of keeping in repair such particular portion of the highways, in the manner before mentioned.

By *Section 5*, It is declared, That nothing therein shall relate to highways repairable by bodies politic or corporate, townships, or such other places, or private persons, by reason of tenure of lands, or otherwise howsoever; but shall be construed to relate to such highways, the repair of which belongs to parishes only; unless such bodies or persons be desirous and shall consent that the same shall be placed under the regulations of this Act; in which case such two justices may proceed therein, in like manner as is herein directed with respect to parishes.

By *Section 7*, Either of the two parishes, by an order in vestry specially called for the purpose, may appeal to the Quarter Sessions of the county where such parishes shall lie, holden next after such order and plan are filed as aforesaid, who may make such order as shall appear to

them to be just, either by affirming, quashing, or amending the order of the two justices; and shall allow costs to either party as they shall think right; which order of Sessions shall not be removed by *certiorari* or otherwise, but shall be final to all intents and purposes whatsoever.

By *Section 8*, Such complaint, summons, adjudication, and plan may be in the several forms stated in the Appendix therunto annexed, or as near thereto as the circumstances and nature of each particular case may admit (*a*).

SECONDLY.—*As to the liability of those who are bound to repair, by reason of inclosure, or by prescription.*

Although a parish is *prima facie* and of common right liable to repair all highways within its limits, yet particular persons may be burthened with this charge, in exemption of the parish, in two cases: 1st, In respect of inclosure; and 2d, by prescription.

I. A person may be bound in respect of *inclosure* to repair a highway; by which is meant, that if the owner of the soil inclose any highway which traverses his land, and was before uninclosed, he thereby renders himself liable to maintain in good repair so much of the highway as he has inclosed. This branch of the law is peculiarly applicable to footpaths.

The leading decision upon this point, is the one in *Sir Edward Duncombe's case* (*b*). The defendant was indicted, for that there being an ancient highway in Batlesdon, he had inclosed his lands on both sides thereof, whereby he had straightened it, and the way was become *lutosa et founderosa*; whereas by the law of the land he

(*a*) See *Davison v. Gill*, 1 East, 64.

(*b*) Cro. Car. 366.

ought to have made it a sufficient way. Upon *Not Guilty* pleaded, and evidence to the jury at the Bar, it appeared to be a way betwixt two lands-ends, in the common fields, and that it was but four yards wide. But it was proved, that although he had made a *causey* reasonable good, at his own charge, for horsemen, yet carts and coaches might not pass, nor could meet for the straightness thereof, nor might go beside the way. And although it was also proved, that by this charge, he had made it *better than it was before*, yet, because he had made the hedges and the inclosure in that manner, he at his peril ought to maintain the way: And whereas before the parish was chargeable with the reparations, now by this inclosure, he is bound to repair it, and to make it a good way, and maintain it at his own charge and peril only. And *Noy*, Attorney-general, said, it was so resolved in 4 Jac. and 19 Jac. upon conference with all the Justices of England, which *Richmond*, C. J. affirmed (a).

The inclosing a highway is considered to be an encroachment upon the rights of the public; for by it the passengers are deprived of their liberty of going over the adjoining land, whenever the way is impassable (b). Therefore the obligation to repair the way is imposed as a punishment for the aggression. And for the same reason, although a parish is not bound to keep a road in better repair than it has been in from time immemorial, yet we see from the above case, that greater rigor is exercised with regard to those who hedge upon the public rights, by obliging them to maintain a *perfect good way*. Also it seems that, if, after one has inclosed a highway, he suffer it to be so much out of repair as to be impassable, it is lawful for passengers to make gaps in his hedges, and to avoid the ill way, so that they do not

(a) And see *Styles*, 364,—and *Rex v. Hillarsden*, 1 Kcb. 894.

(b) See ante, p. 37.

ride further into his inclosed grounds, than is needful for avoiding the bad way (a).

And if one inclose land on one side, which was anciently inclosed on the other side, he who has made the new inclosure ought to repair the whole way. But if there were no ancient inclosure on the other side, then he is bound to repair only half of the way; and if any other person inclose the other side of the way, in that case they must repair the way in moieties (b).

But if the owner destroy his inclosures, and again open the way, it seems that he shall be freed from the repairs thereof; and the burthen shall thereupon revert to the parish (c).

Where, however, the way is altered or changed and inclosed by a legal proceeding, as by a writ of *ad quod damnum*, or under the authority of the statutes 13 Geo. 3. c. 78, and 55 Geo. 3. c. 68, the owner of the land is not obliged to repair the new road; unless, in the case of a writ of *ad quod damnum*, the jury impose the burthen upon him, or the new road lie in another parish (d).

So, where a highway is inclosed under the authority of an Act of Parliament for dividing and inclosing open fields, the person who incloses the way is not bound to repair it (e).

It appears to be clear, that in the case of footpaths, all stiles between different inclosures must be kept in good

(a) Henn's Case, Sir W. Jones, 296.—And see 3 Salk. 182.

(b) Rex v. Sir N. Staughton, 1 Sid. 464.—2 Saund. 160, S. C.

(c) 2 Saund. 160.

(d) Ex parte Vennor, 3 Atk. 772.—Rex v. Inhabitants of Flecknow, 1 Burr. 461.

(e) 1 Burr. 461.—And see Rex v. The Commissioners of Llandilo, 2 T. R. 232.

repair by the occupier of the field. And it is sufficient to indict him as occupier, and not as owner; for the public are not obliged to search out who is owner (a).

II.—A particular person may be bound *by prescription* to repair a highway.

It is said, that a corporation aggregate may be compelled to do it by force of a general prescription, "that it ought and hath used to do it," without shewing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation, in judgment of law, never dies; and therefore if it were ever bound to such a duty it needs must continue to be always so; neither is it any plea, that such a corporation have always done it out of charity; for what it hath always done, it shall be presumed to have been always bound to do. But it is said, that an individual cannot be charged with such a duty by a general prescription, from what his ancestors have done, unless it be for some special reason, as the having lands descended from such ancestor which are holden by such like service (b).

Lord Coke, in observing upon the duty of repairing bridges and highways, (both which it may be remarked, are, in this respect, regulated by the same principles, with the exception, that we must substitute the parish in regard to the one for the county in regard to the other) says, that it was determined at Serjeants' Inn, That a man may be bounden to repair a bridge *ratione tenuræ* of cer-

(a) See 1 Salk. 357, pl. 3. and 7 Mod. Rep. 55.

(b) 1 Hawk. P. C. c. 76. s. 8. And see Austin's Case, 1 Ventr. 189.

tain land (*a*); but a particular person cannot be bound by prescription (*scil.*) that he and all his ancestors have repaired the bridge, if it be not in respect of the tenure of his land, taking of toll, or other profit; for the act of the ancestor cannot charge the heir without profit. But an abbott or other corporation, who hath a lawful being may be charged, (*scil.*) That he and his predecessors time out of mind have repaired the bridge; for the abbott and convent may bind their successors. And if an abbott and his predecessors, time out of mind, have repaired a bridge of alms, they shall be compelled to repair it; and therewith agreeth 10 E. 3. 28. So it is of a highway. Of common right all the country ought to repair it, but yet some may be particularly bound to repair it, as is afore-mentioned (*b*).

Thus in a case where to an indictment for non-repair, it was pleaded on behalf of the parish, that *another parish* had been accustomed to repair and of right ought to have repaired; the plea was disallowed, because they ought to have added some *consideration*, on account of which such other parish was bound to repair. And *Bayley* and *Holroyd*, Justices, said, That particular persons cannot be charged by prescription without shewing a consideration; but a corporation sole or aggregate may be bound to repair by usage or prescription without more (*c*). But that a parish could not be bound by prescription, for individuals in a parish cannot bind their successors. And

(*a*) An indictment, charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given

thereon, upon error brought, it will be reversed, *Rex v. Mathias Kerrison*, 1 M. & S. 435.

(*b*) 13 Rep. 33.

(*c*) Because a corporation never dies—Bac. Abr. tit. Highway, F.

Lord *Ellenborough*, C. J. observed, that the parish is bound, unless they can shew that the burthen is cast upon some other persons, under an obligation equally durable with that which would have bound the parish, which obligation must arise in respect of some consideration of a nature as durable as the burthen cast upon them (a).

But although, as an individual cannot be liable to repair a highway in exemption of the parish without a sufficient consideration, that consideration must be expressed upon the face of the indictment; yet the case is otherwise, and such averment is not necessary, where by custom a *township* is obliged to repair the highways within its own boundary; for the tenure of the lands in the township is an inherent and sufficient consideration to support the custom, and is taken notice of by law without being expressly pointed out to the Court; therefore it will be enough to state on the indictment, that the township hath been used and accustomed to repair, and of right ought to repair, &c. To this effect is the case of *Rex v. The Inhabitants of Ecclesfield* (b). The parish pleaded to an indictment, That the inhabitants of a township, from time whereof, &c., "have repaired and amended and have been used and accustomed to repair and amend and of right ought to have repaired and amended and still of right ought to repair and amend," &c. so many of the common highways situate therein as would otherwise be repairable by the parish at large. It was objected to this plea that as the inhabitants of a district are not a corporation, some consideration ought to have been expressed to shew how they were bound to repair. The

(a) *Rex v. The Inhabitants of the Parish of St. Giles, Cambridge*, 5 M. & S. 260.

(b) 1 B. & A. 348.

objection was, however, over-ruled. And in giving judgment, Lord Ellenborough, C.J. observed, "In the argument in support of the motion the matter of this plea was treated as a prescription; but we think it is more properly to be considered as a custom. There are two distinctions between custom and prescription mentioned by Lord Coke in *Gateward's Case* (a), which are material to the present purpose. A prescription always is alleged in the person. A custom ought always to be alleged in the land or place. Every prescription ought to have by common intendment a lawful beginning; but, as is well expressed by Mr. Justice Blackstone in his *Commentaries* (b), 'Customs must be reasonable; or rather taken negatively, they must not be unreasonable; upon which account a custom may be good, although the particular reason of it cannot be assigned, for it sufficeth if no good reason can be assigned against it.' Now the matter of this rule applies not to any particular individual, but to the inhabitants of a known district of country, and to a subject existing within that district; and it is of a local and not of a personal nature. It is a general rule of the common law, that highways and bridges are (except in certain excepted cases) to be repaired by the inhabitants of the territory wherein they are situate, as a charge upon the land within that territory, to be defrayed by the occupiers for the time being: the charge is upon the land, and upon the inhabitants in respect of the land, not in respect of their person or residence. An occupier of land is chargeable although he reside elsewhere; a resident, not being an occupier, such as an inmate or servant, is not chargeable." After arguing by analogy from the case of bridges, his Lord-

(a) 6 Rep. 60.

(b) See vol. i. p. 77.

ship said, "The present case is clearly distinguishable from that of *The King v. The Inhabitants of St. Giles, in Cambridge*. In that case the highway in question lay out of the parish which it was attempted to charge; and upon that ground the Court there held the plea to be bad. All customs are purely local and confined to particular places. There cannot be a custom in one place to do something in another. The land in a particular place, and the inhabitants in respect thereof, may be charged by custom for matters within the place; but custom will not apply to matters out of it." This decision is fully confirmed in the case of *Rex v. The Inhabitants of the West Riding of Yorkshire* (a).

It is a consequence directly flowing from the principle just laid down, that, in order to charge a township with the repair of a highway, it must be stated in the indictment to be situated therein. Therefore, where an indictment stated that an ancient bridge situate within the parishes of M. and P. was out of repair, and that the inhabitants of the said parish of P. and town of M. aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of P. and town of M., have repaired the bridges; it was decided that the indictment was bad, because it did not appear that the bridge was situate within the town; and therefore, that the inhabitants of the town were not liable, unless a special consideration were shewn (b).

And in the last case, it was held that the inhabitants of a parish, township, or other district, cannot, in their

(a) 4 B. & A. 623; and see Keilw. 52 a.

(b) *Rex v. The Inhabitants of Machynlleth and Pennegoes*, 8 B. & C. 166.

character of inhabitants, be liable to the repair of a highway by reason of the tenure of lands; for they cannot; as such inhabitants, hold lands.

Although it is not necessary to state an express consideration, in an indictment against a township, yet it must be alleged that it *has been accustomed* to repair all highways within its limits (*a*). For the *custom* is the reason for charging the township, and is traversable; it is, therefore, a most material point to appear upon the record.

By means of this distinction, as to the allegation of a custom and that of an individual prescription, a very important end is answered. For if an express consideration were obliged to be shewn for the repair of each particular road by a township, and thus the liability were by way of prescription, no new roads could ever become chargeable for their maintenance upon any smaller district than the whole parish. A prescription must be from time beyond the memory of man (*b*). And if the prescription stated on the record applies only to the single road indicted, (which must be the case, wherever it is necessary to aver an express consideration), proof that the way had been made since the time of legal memory would rebut the prescription, and thereby exonerate the township. This was decided in the case of *Rex v. The Inhabitants of Hatfield* (*c*), where the difference in this respect between the pleading a local custom, and a prescription, is stated by Abbott, C. J. And Holroyd, J. says, "The township is by the prescription" (or rather

(*a*) *Rex v. The Inhabitants of Great Broughton*, 5 Burr. 2700; and see *Rex v. The Inhabitants of Penderryn*, 2 T. R. 513, which was the case of a presentment

upon view by a Justice, under 13 Geo. 3. c. 78.

(*b*) Co. Lit. 113 b.

(*c*) 4 B. & A. 75.

the custom) (a) "placed on the same footing as a parish, both as to immemorial roads, and also as to any new highways which may have been subsequently made."

As a prescription must be *immemorial*, it follows that the parish cannot be exempted from their common-law liability by any *agreement* with others to make the repairs; for the very existence of the agreement negatives such a presumption (b).

The following points appear to be deducible from the cases which we have reviewed; that the parish may be relieved from its common-law liability by pleading—1st, A prescription affecting individual persons, either sole or bodies politic; or 2dly, A custom affecting the inhabitants of the district through which the highway passes;—and that in the first instance a consideration must be shewn in order to charge a sole individual; which, however, the law will presume against a corporation; although neither an individual nor a corporation can be held liable to repair any but *immemorial* ways;—but that, in the second instance, mere usage, without the averment of any consideration, will suffice to bind a township or other district, under the plea of a general custom to repair all highways within its boundary; and by such a custom it becomes liable to the maintenance of all modern, as well as of all ancient ways.

Where lands bound to the repair of a bridge or highway *ratione tenuræ*, are conveyed to several persons, every

(a) See per Ld. Ellenborough, in *Rex v. The Inhabitants of Ecclesfield*, ante, p. 96.

(b) See *Rex v. Mayor, &c. of Liverpool*, 3 East, 86.

one of the grantees, being a tenant of any parcel, is liable to the whole charge, and must have contribution from the others. Therefore, where a manor, so bound, was conveyed to several persons, it was held that a tenant of any parcel, either of the demesnes or of the services, was liable to the whole repair, and might call upon the tenants of the residue to contribute. And that the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the burthen; in which case the grantees must have their remedy over against the grantor. And the reason seems to be, because the whole manor or land, being once chargeable with the repair, shall remain so notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or by alienations to insolvent persons to render the remedy against such persons quite frustrate. And though such lands or manor come into the hands of the Crown, yet the obligation or duty continues; and any person afterwards claiming the whole or any part of it under the Crown, will be liable to an indictment for not repairing (a).

And Mr. Hawkins says (b), that any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the Court, for the default of repairs, and shall be put to his remedy at law for a contribution from those who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest

(a) *Regina v. Duchess of Buckleugh*, 1 Salk. 358.—*Rex v. Buckeridge and Others*, 4 Mod.

Rep. 48; and see 3 Vin. Ab. *Apportionment*, 5, pl. 9.

(b) 1 Hawk. P. C. c. 77. s. 3.

expedition in cases of this nature; for bridges being of absolute necessity, are not to lie unrepaired, till suits are determined.

In *Rex v. The Inhabitants of Oxfordshire* (a), to an indictment for not repairing a bridge, the defendants pleaded that Mr. *Marsack* was liable *ratione tenuræ*. At the trial it appeared that the bridge had always been repaired by the *Cadogan* family, who were formerly owners of the estate, then the property of Mr. *Marsack*. Mr. *M.* purchased the whole of the *Cadogan* estate, except about 100 acres, called *Dirty Coppice*, which Lord *Cadogan* still retained, and who, since the conveyance to Mr. *M.*, had continued to repair the bridge. The learned Judge at the trial thought that this evidence was not sufficient to charge Mr. *Marsack* with the liability; and upon motion for a new trial, this opinion was confirmed by the Court of K. B., Lord *Ellenborough*, C. J., observing, "The defendants have not maintained their plea. It is pleaded, that *Marsack* and all those whose estate he has have immemorially repaired. Now there is no evidence that he and those who had the estate have repaired, for it appears that since he purchased the estate another person has repaired. It would have been more correct to have pleaded that he and those whose estate he has with others, have repaired, instead of which the burthen is cast on him impartibly, without giving him the benefit of a contribution from Lord *Cadogan*."

If a way, from the repair of which the parish (or, if it be a bridge, the county) is exempted by reason of others being bound thereto by prescription, be enlarged, it seems that those who were liable by the prescription shall

(a) 16 East, 223.

not have their burthen increased on account of such enlargement, but that the repair of the *new* part of the way shall be made at the expence of the parish, or county, as the case may be (a).

Thus where to an indictment against a riding for not repairing a public carriage bridge, the plea alleged that certain townships had immemorially been used to repair the said bridge: upon evidence, that this had been a foot bridge till the year 1745, when it was enlarged to a horse bridge, and in 1755 to a carriage bridge, by the townships and at their expence; and that the riding had never repaired it: It was held that this evidence did not support the issue; that the townships were not liable to repair the *carriage bridge*; but that where townships have so enlarged a bridge, which they were before bound to repair as a foot bridge, they shall still be liable *pro rata*. For where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge; but shall still repair it as a foot bridge (b).

It has been contended, on the part of the county, that where a bridge has been built by trustees under a Turnpike Act, who were thereby enabled to raise tolls, a *quasi* prescription binds them to keep in repair the bridge which they have built, *in exemption* of the county. This point, however, has been decided against the county, even where the Act of Parliament empowered the trustees to raise tolls, and also "to build, erect, *repair*, and *keep in repair* any bridge or bridges," &c. (c)

(a) See a provision to this effect, as to turnpike roads, in stat. 4 Geo. 4. c. 95. s. 68; and post, Chapter V.

(b) *Rex v. The West Riding*

of Yorkshire, 2 East, 353, note.

(c) *Rex v. The Inhabitants of Oxfordshire*, 4 B. & C. 194. See ante, p. 76, *Rex v. Inhabitants of Netherthong*.

And in *Rex v. The Inhabitants of the West Riding of Yorkshire* (a), where a similar decision was made, it was said, that the tolls cannot be a consideration sufficient to support such a claim upon the trustees, as they enjoy no private advantage from the receipt of them.

As to pleading.—The following points, as to the proper method of pleading a prescription to repair a highway, are of use to exemplify what has been said upon the nature of such a liability.

Where a parish attempts to transfer to others the burthen of repairing their highway, by prescription or custom, they must state the obligation *with certainty*; and therefore they must shew how much of the way is liable to be repaired by such persons. Accordingly when to an indictment against the inhabitants of a parish for non-repair of a highway within it, it was pleaded, that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of G. B. and the residue within the township of L. B., and that the respective parts ought to be repaired by the inhabitants of the respective townships: The plea was held to be defective, for not specifying what part of the highway was situate within the one township, and what part within the other (b).

And if a man be indicted, for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that

(a) See 2 East, p. 352, per Lawrence, J.

(b) *Rex v. The Inhabitants of Bridekirk*, 11 East, 304.

it is in decay; it must be alleged where those lands lie (a):

In an information for not repairing a bridge, it was alleged, that defendant ought to repair, "because he now is and for divers years past hath been lord of the manor of B." &c. Upon motion in arrest of judgment, it was held, that although the defendant was lord of the manor, yet that was no reason why he should repair the bridge, but some particular charge ought to be shewn, as *ratione tenuræ*, or by prescription (b).

It seems that the occupier, and not the owner, is the proper person against whom the indictment should be brought. For how are the public to know who is the owner of the lands charged with the repair? And it does not seem to be material what estate the occupier has in the lands liable (c).

THIRDLY.—*As to the statutory provisions which have been made to regulate the reparation of highways (d).*

The enactments which the Legislature has made for this purpose are in aid of, and supplementary to the common law. Their object is to appoint certain officers, called

(a) 2 Hale Pl. Cor. 181.

(b) *Regina v. Sir John Bucknall*, 2 Ld. Raym. 804; and see *Rex v. Kerrison*, 1 M. & S. 435.

(c) *Ibid.*; and *Regina v. Watts*, 1 Salk. 357; and see 2 Wms. Saund. p. 158, note 9.

(d) The principal Highway Act is the stat. 13 Geo. 3. c. 78. Later Acts have been passed; but

they are only supplementary, and they respectively incorporate all the prior provisions which are not thereby expressly altered or amended. See 34 Geo. 3. c. 74. s. 7. and 54 Geo. 3. c. 109. s. 9. The whole must therefore be considered as one Act, with regard to the reference between the several clauses.

Surveyors, whose business it is to superintend the repair of highways, and to enforce, under the regulations contained in the Acts, that duty of repairing which is imposed by law in the manner already described.

These enactments may be advantageously classed under five heads; as they regard, 1st, The appointment and duty of surveyors: 2d, Personal labour, technically called statute duty; and the power to compound in lieu thereof: 3d, The procuration of materials for the repairs: 4th, The power to levy assessments, where the statute duty and composition prove insufficient: and 5th, Certain miscellaneous regulations, as to repair in general, and as to the execution of the several Acts.—I shall notice under their respective heads the decisions which have been made by the Courts relative thereto.

1. The Appointment and Duty of Surveyors.

Appointment of surveyor, by lists.—By the statute 13 Geo. 3. c. 78. s. 1., Upon the 22d day of September in every year, unless that day shall be Sunday, and then on the day following, the constables, headboroughs, tythingmen, churchwardens, surveyors of the highways, and householders (*a*), being assessed to any parochial or public rate, of every parish, township, or place, shall assemble together at the church or chapel of such parish, township, or place; or if there shall be no church or chapel, then at the usual place of public meetings for such parish, township, or place, at the hour of eleven in the forenoon: And the major part of them, so assembled, shall make a list (*b*) of the names of at least ten persons living within such respective parishes, town-

(*a*) See Form of Warrant, Appendix, No. IV.

(*b*) See Form, Appendix, No. V.

ships, or places, who each of them have an estate in lands, tenements, or hereditaments, lying within such respective parish, township, or place, in their own right or in the right of their wives, of the value of £10 by the year; or a personal estate of the value of £100; or are occupiers or tenants of houses, lands, tenements, or hereditaments of the value of £30: And if there shall not be ten persons having such qualifications as aforesaid, then they shall insert in such list the names of so many of such persons as are so qualified, as above required, together with the names of so many of the most sufficient and able inhabitants of such parish, township, or place, not so qualified, as shall make up the number of ten, if so many can be found; if not, so many as shall be there resident, to serve the office of surveyor of the highways:—And the constable, headborough, or tythingman of such parish, township, or place, shall within three days after such meeting transmit a duplicate of such list to one of the justices of the peace within the limit of the county, riding, division, hundred, city, corporation, precinct, or liberty, where such parish, township, or place shall be, living in or near the same; and shall also return and deliver the original list, made and agreed upon at such meeting, to the justices of the peace at their Special Sessions to be held for the highways within that limit in the week next after the *Michaelmas* General Quarter Sessions in every year; and shall also, within three days after making the said list, give personal notices to, or cause notices in writing (a) to be left at the places of abode of the several persons contained in such list, informing them of their being so named, to the intent that they may severally appear before the justices at the said Special Sessions, to accept such office, if they shall

(a) See Form, Appendix, No. VI.

be appointed thereto, or to shew cause, if they have any, against their being appointed:—And the said justices are hereby authorized and required to hold such Special Sessions at such convenient place or places within their respective limits, as they in their discretion shall judge proper; and to give notice (*a*) of the time and place where they intend to hold the same, to the constables, headboroughs, or tythingmen of every such parish, township, or place, at least ten days before the holding of the said Session:—And the said justices then and there, from the said lists, according to their discretion, and the largeness of the parish, township, or place respectively, by warrant (*b*) under their hands and seals, shall appoint one, two, or more of such persons as aforesaid, if he or they shall, in the opinion of such justices, be qualified for the office of surveyor; if not, one, two, or more of the other substantial inhabitants or occupiers of lands, tenements, woods, tithes, or hereditaments within such parish, township, or place, living within three miles thereof, and within the same county, fit and proper to serve the office of surveyor of the highways for such parish, township, or place, if any such can be found; which appointment shall, by the constables, headboroughs, or tythingmen aforesaid, be notified to every person so appointed by the said justices, within three days after such appointment, by serving him with the said warrant, or by leaving the same, or a true copy thereof, at his house or usual place of abode:—And every person so appointed, if he accepts the said office, shall be surveyor of the highways for the said parish, township, or place, for the year ensuing, and shall take upon him and duly execute the office aforesaid; And the said justices shall

(*a*) See Appendix, No. IV.

(*b*) See Form, Appendix, No. VII.

then and there give such of the said surveyors, as shall personally appear before them, a charge for the better performance of their duty according to the directions of this Act:—And if any of the said persons so appointed, whose names were contained in such list, and who are served with the said notice, shall refuse or neglect to appear at the said Special Sessions, and accept the said office, if appointed thereto in manner aforesaid; or shall not, within six days after being served with such warrant of appointment, signify his acceptance thereof, either in person or by writing, to one of the said justices, he shall forfeit the sum of £5 (a):—And in case any person so appointed by the said justices, whose name was not contained in such lists, shall refuse or neglect to accept the said office, or shall not, within six days after being served with such appointment, shew to one of the justices signing such appointment sufficient cause why he should not serve such office, he shall forfeit the sum of fifty shillings:—Provided that no person who hath been appointed and served the office of surveyor for one year, shall be liable to be appointed surveyor for the same parish, township, or place, within three years from the time of such first appointment and service, unless he shall consent thereto.

In the above clause the list is directed to be delivered to, and the appointment to be made by, the justices at their Special Sessions in the week next after the *Michaelmas General Quarter Sessions* of the Peace in every year. By

(a) By s. 72 of this Act, all penalties and forfeitures imposed thereby are to be recovered by distress, and applied, unless otherwise directed by this Act, one half to the informer, and the other half

towards the repair of the highways: except where the surveyor is the informer, when the whole is to be applied to the repair of the highways. See post, Chapter VI.

an Act passed in the 54 Geo. 3. (c. 84) the time for holding the Michaelmas Quarter Sessions has been altered. It has, therefore, been enacted by 55 Geo. 3. c. 68. s. 6. that it shall be lawful for the justices of the peace assembled in their Special Sessions in the week after *Michaelmas* to do and perform every act which they might heretofore legally have done in the Special Sessions directed to be holden in the week after the said *Michaelmas* General Quarter Sessions of the Peace.

As to the requisition, that on the 22d September "the constables, headboroughs, tythingmen, churchwardens, surveyors of the highways, and householders being assessed," &c. shall assemble, &c. it has been doubted (a) whether all those persons were made *constituent parts* essential to the legality of such assembly, so that a list made at a meeting where any class was not present would be void. But in the case referred to, the Court seemed to incline strongly to the opinion that the Legislature only meant it to be a full parochial meeting, without intending that each of these bodies should be such essential constituent parts of it, that their acts would be annulled and made void by the absence of the churchwardens, or of the constables, or headboroughs, or tythingmen, or other respective denomination.

Although the justices are required to appoint the surveyors "at their Special Sessions to be held for the highways in the week next after *Michaelmas* General Quarter Sessions of the Peace in every year," yet it is not absolutely necessary that the appointment should be made at that particular period. This is decided by the case of

(a) *Rex v. Pettward, et al.*, 4 Barr. 2452.

Rex v. The Justices of Denbighshire (a), where Lord Ellenborough, C. J. says, "This part of the Act is only *directory* to the magistrates to make the appointment at the time mentioned; but there are no negative words to prevent them from exercising their office in that respect at any subsequent time, if it shall be necessary. And common sense requires, that, if the appointment be not made at the first Special Sessions, it should be made afterwards."

And the power vested in the magistrates has been held to be so entirely discretionary, that they are not even obliged to select the surveyors from the persons, whose names are contained in the list delivered to them; as the same is directed to be made merely for their guidance.

Thus in one case (*b*), a list of twenty-one persons had been made and delivered to the justices; and they appointed three persons to be surveyors, one of whom was not named in the list. It was urged as an objection to the appointment, that one of the surveyors was not named in the list; *Sed per* Lord Kenyon, C. J., "By the first section in the Act of Parliament, if the list of persons returned to the justices does not contain the names of persons whom the justices think qualified, the justices may appoint any other persons of the parish who are properly qualified. If, indeed, the magistrates act corruptly, they may be punished for an abuse of their discretionary power: but no corruption is even suggested in this case. The lists are directed by the Act only for the purpose of assisting the magistrates, who in many instances might not perhaps know a sufficient number of persons fit to serve the office."

(a) 4 East, 142.

(b) *Rex v. Baldwin and Others*, 7 T. R. 169.

The surveyors may be appointed for a less district than the whole parish. In the last case, the three surveyors were not appointed for the whole parish, but each of them for a particular division. This was urged as an objection to the appointment, but was over-ruled; Lord *Kenyon* observing, "It appears this has been the mode of appointing surveyors in this parish for several years past. And in many other parts of the country the surveyors are appointed for townships and other small districts."

In the above case of *Rex v. Baldwin* the learned Chief Justice concluded by saying, "At any rate if there be any objection to the appointment of the surveyors, the party objecting should first remove the appointment by *certiorari*, and then move to quash it." This *dictum*, however, appears to be founded on a mistake. For in a late case (a), a rule *nisi* which had been obtained for a *certiorari* to remove an appointment of surveyors of highways into the Court of K. B., in order that the same might be quashed, was discharged. The argument turned upon the 80th section of the 13 Geo. 3. c. 78, which gives an appeal to any person aggrieved by any thing done in execution of the Act; and takes away the power to remove proceedings by *certiorari*. Abbott, C. J., in delivering the judgment of the Court, said, "Supposing that the words of the 81st section (b), taking away the *certiorari*, are to be confined to cases in which an appeal is given, then the applicant should have made out that no appeal lies against the appointment of surveyors. I think that such an appeal does lie. The words of the Act are general, and give an appeal to any person aggrieved by any thing done in pursuance of the Act by

(a) *Rex v. The Justices of St. Alban's*, 3 B. & C. 698.

(b) This is an error. It is s. 80.

any justice of the peace or other person. The appointment of surveyors is a thing done in pursuance of the Act, and I cannot see the force of the distinction between acts done by the justices at Petty Sessions, or elsewhere; nor has the party grieved any other remedy given by the Act. But it is said that no person can say that he is aggrieved. If so, no person can apply to quash the appointment; but, in truth, every inhabitant is aggrieved by a bad appointment of surveyors. But, independently of all question about the appeal, I think that the *certiorari* is taken away by the general words of the 81st (i.e. the 80th) section: 'No proceedings to be had or taken in pursuance of this Act shall be removed by *certiorari* into any of his Majesty's Courts of Record at Westminster;' *quacunque via*, therefore, the *certiorari* is taken away, and this rule must be discharged."

In default, surveyor with a salary to be appointed.—By the 1st section of stat. 13 Geo. 3. c. 78: If no such list shall be made and returned, or if the said justices shall make such appointment as aforesaid, and the person or persons so appointed shall refuse to serve the said office, the said justices, or any two of them, shall and may, and are hereby required, at the said Special Sessions, or at some subsequent Special Sessions to be held within one month after, to nominate and appoint some other person or persons to be surveyor of such parish, township, or place, whom they shall judge proper to execute that office;—And shall and may fix such salary to be paid to such surveyor, to be appointed as herein last before mentioned, out of the said forfeitures, and all other forfeitures, fines, penalties, assessments, and compositions, to be paid, levied, and raised under the authority of this Act, within such parish, township, or place respectively, as such justices shall think fit, not exceeding one—

eightth part of what shall have been raised by an assessment of sixpence in the pound for the use of the highways within such parish, township, or place, where any such assessment shall have been raised, and observing the same restriction as near as they can, from the best information they shall be able to get of the probable amount of such an assessment, where none hath been already made : And the said justices shall and may if they think fit, require (a) the constables, headboroughs, tythingmen, and surveyor of every such parish, township, and place, or any of them, to return to them, at such time and place as they shall appoint, an account in writing (b) of the sum which such assessment of sixpence in the pound hath raised, or will, in his or their opinion, raise within such parish, township, or place.

Penalty on constables, &c.—By the same *Section*, If the constables, headboroughs, tythingmen, churchwardens, surveyor of the highways, and such householders as aforesaid of any parish, township, or place, shall neglect or refuse to make such list as aforesaid; or if the constable, headborough, or tythingman, of any parish, township, or place, shall not return the said list of names when made, and such duplicate thereof as aforesaid, and give such notice or notices, and serve such warrant or warrants, as in this Act is directed; or if the said constable, headborough, tythingman, and surveyor, or any of them, shall neglect to return such account of the amount of such assessment as aforesaid, when so required as aforesaid, every constable, headborough, tythingman, churchwarden, or surveyor, so neglecting or refusing in any of the said

(a) See Form, Appendix, No. VIII.

(b) See Form, Appendix, No. IX.

cases, shall for every such default respectively forfeit the sum of forty shillings.

Appointment of assistant surveyor.—By Section 2, of stat. 13 Geo. 3. c. 78, In all cases where the said justices, upon neglect or refusal of the person so nominated surveyor as aforesaid to accept the said office, shall appoint any other person for such surveyor, with a salary as aforesaid, the said justices shall and are hereby required to appoint(a) one substantial inhabitant of such parish, township, or place, for assistant to such surveyor in the several matters and for the several purposes hereafter mentioned, until the next annual appointment of surveyors, according to the directions of this Act:—And if the person so appointed assistant shall, upon notice of such appointment, refuse to accept that office, he shall forfeit the sum of fifty shillings; and in that case it shall be lawful for such justices to appoint any other substantial inhabitant of such parish, township, or place, for assistant to such surveyor, in manner and for the time aforesaid; and if such second appointed assistant shall decline or refuse to accept the said office, he shall in like manner forfeit fifty shillings; and the said justices shall and may appoint any other person, inhabiting in such parish, township, or place, assistant to such surveyor, who shall be entitled to the said forfeitures herein last before mentioned, and also to some further allowance by way of salary, (to be paid as the surveyor's salary is hereby directed to be paid), if the said justices shall think any such salary necessary, and shall order the same, which they are hereby authorized to do:—Provided that no person so appointed assistant for one year shall be liable to be appointed assistant for the same parish, township,

(a) See Form, Appendix, No. X.

or place, within three years next following such first appointment, without his consent.

Bond to be given by surveyor.—And by Section 3, The surveyor of every parish, township, and place, who shall not reside therein, but shall be appointed with such salary as aforesaid, shall, if required by the churchwarden, overseer of the poor, or any principal inhabitant of the parish, township, or place for which he shall be so appointed surveyor, at the time of his appointment, or within fourteen days after, give a bond (*a*) upon paper, without stamp thereupon, to some proper person within such parish, township, or place, to be nominated by the said justices, with sufficient surety, to account for the money which shall come to his hands as surveyor, according to the directions of this Act; which bond shall be good and effectual in law.

Duty of assistant surveyor.—By Section 4, The assistant, so to be nominated and appointed, shall, and is hereby required, to the best of his skill and judgment, to assist the said surveyor, whenever requested by him, in calling in and attending the performance of the statute duty; in collecting the compositions, fines, penalties, and forfeitures; in making and collecting the assessments; in making out and serving the notices authorized by this Act; and in such other matters and things as shall be reasonably required of him by the surveyor, in the execution of his office as surveyor, pursuant to this Act:—And the said assistant shall justly and truly account with and pay to the said surveyor, or to his order, from time to time, according to the directions of this Act, all the money

(*a*) See Form, Appendix, No. XI. For this bond the justices' clerk shall have sixpence and no more. 13 Geo. 3. c. 78. s. 48.

which shall come to his hands as assistant, by the means aforesaid; and in default thereof he shall forfeit double the value of the money by him so received and not so paid and accounted for:—And if the said assistant shall wilfully neglect or make default in the performance of any of the duty required from him by this Act, he shall forfeit for every such offence any sum, not exceeding £5 nor less than 40s., at the discretion of the justice or justices of the limit within which such assistant shall be appointed:—And the said surveyor shall, and is hereby required to send orders in writing upon the said assistant, for the payment of all sums due to any person or persons, for work or materials, by virtue of this Act, which amount to 40s. or upwards;—And the said surveyor shall not be responsible for any sum or sums of money, which shall be received by the said assistant, and shall not be actually paid to such surveyor, or to his order, as aforesaid.

Surveyor, with a salary, may be appointed in the first instance.—By Section 5, If two parts out of three of those so to be assembled in any such parish, township, or place, for the nomination of surveyors as aforesaid, shall agree in the choice of any particular person of skill and experience, to serve the said office of surveyor for such parish, township, or place, and, in the settling of a certain salary for his trouble therein, and shall return the name of such person, together with the list hereinbefore directed, to the justices of the peace at their said Sessions to be held in the week next after the Michaelmas Quarter Sessions (a); then, and in every such case, it shall be lawful for the said justices, if they shall think proper, to appoint such person to be surveyor for such parish, township, or place, and allow him the salary men-

(a) See ante, page 108.

tioned in such agreement, which shall be raised and paid in the same manner as the salary hereinbefore mentioned is directed to be raised and paid.

In case of death, &c. new surveyor to be appointed.—By the same *Section*, In case any surveyor to be appointed under the authority of this Act shall die, or become incapable of executing that office, before such next Special Sessions for appointing surveyors, the said justices, or any two of them, shall and may, at some Special Sessions, nominate and appoint such person or persons as they shall think proper, to execute the said office, until such next Special Sessions for appointing surveyors, as aforesaid; and if such deceased surveyor had a salary, they may allow the same salary to his successor, in proportion to the time he shall serve the said office;—And if the said justices of the peace, at their said Special Sessions, or at any time afterwards, pursuant to the powers of this Act, shall appoint more than one person for surveyor of any parish, township, or place, all and every person or persons so appointed shall be comprehended under the word *surveyor*, in every part of this Act.

As to justices of cities, &c.—By 13 Geo. 3. c. 78. s. 53, Justices of the peace of all cities, corporations, boroughs, and other places, are required to put in execution every part of the Act within their respective jurisdictions.

But it is provided by the 54th *Section*, That nothing in this Act contained shall empower any justice or justices of the peace for any city, town corporate, or borough, to fix or allow any salary to or for any surveyor to be appointed by any such justice or justices, other than and except such salary as shall be settled and agreed upon by two parts out of three of the persons assembled in the

parish, township, or place, within such city, town corporate, or borough, for which such surveyor shall be appointed, pursuant to the directions of this Act.

Abstract of Act to be given to surveyor.—By Section 70, In order to have the contents of this Act more generally communicated and known, the justices within their respective limits shall, at every Special Sessions to be holden in the week next after the Michaelmas Quarter Sessions (a), procure and deliver, or cause to be procured and delivered, a printed abstract of the most material parts of this Act to every surveyor to be then appointed by them, as the charge hereby directed to be given.

Exception of Bristol, &c.—By Section 85, It is provided, that nothing in this Act contained, touching the appointment of surveyors, shall be deemed to extend to the city of Bristol.

THE DUTY OF THE SURVEYOR.—This is generally to put into execution the several provisions of the Act; and so far, to state the duty would be to detail the whole of the enactments; but there are some clauses that relate especially to the surveyor, which will now be noticed.

To account, &c. and the passing of his accounts: and the transfer to the succeeding surveyor.—By 13 Geo. 3. c. 78. s. 48, The surveyor of the highways for every parish, township, or place, shall carefully and diligently collect, or cause to be collected, the several assessments, forfeitures, penalties, sums of money, and compositions, directed and allowed to be received and taken within the

(a) See ante, page 108.

same, by virtue of this Act, within the year for which he is appointed surveyor, and shall keep one or more book or books, in which he shall fairly enter a just, true, and fair account of all such money as shall have come to his hands, or to the hands of the said assistant, in respect of such parish, township, or place, by virtue and for the purposes of this Act, and to whom, and on what occasion, he shall have paid and applied the same;—And shall also enter in such book or books a list or lists of all such sums of money as shall then remain due and owing from any person or persons, in respect of the payments, compositions, assessments, penalties, or forfeitures, to be collected, received, or taken, for and in respect of the said highways, by virtue of this Act;—And the said surveyor shall also enter in the said book or books an account of all tools, materials, implements, and other things provided, or to be provided, by order of the inhabitants at a vestry or other public meeting, for the repair of the said highways, at the public expence of such parish, township, or place:—AND shall produce such books, and the assessments made within that year for the purposes of this Act, unto the inhabitants of the parish, township, or place, to which they belong, at a vestry or other public meeting to be held for that purpose, within fifteen days before the said Special Sessions so to be held in the week next after Michaelmas Quarter Sessions as aforesaid (a), to the intent that the said accounts, assessments, and lists, may be inspected by the inhabitants of such parish, township, or place respectively:—And every such surveyor shall, after the said books and assessments shall have been produced at such meeting, take the same to such justice of the peace, for the limit wherein such parish, township,

(a) See ante, page 108.

or place doth lie, and on such day and at such hour, as shall be agreed upon at such meeting, some day after the said meeting of the inhabitants and before such last-mentioned Special Sessions, and then and there verify such account, or any part thereof upon oath (a), if required; and such justice (b) may allow such account (c), if he finds it just, or postpone it until such Special Sessions, if he finds cause for so doing; in which case it may be settled and allowed at such Special Sessions (b), after the parts objected to by such justice shall have been explained and verified by proper evidence, to the satisfaction of the justices at such Special Sessions; and in case any articles contained in such accounts shall not be explained and proved to the satisfaction of such justices, they may disallow the same:—And whenever the said accounts shall be so settled, and allowed or disallowed as aforesaid, all such books and assessments shall be transmitted to the churchwarden or overseer of the poor for such parish, township, or place respectively, or if the place be extra-parochial, then to some principal inhabitant thereof, to be kept for the use of such parish, township, or place:—AND the said surveyor shall forthwith deliver a duplicate of such book and account, together with all sums of money as shall remain in his hands, and likewise all tools, materials, implements, and other things, as aforesaid, to the succeeding surveyor for such parish, township, or place, in case any new surveyor shall be appointed; or retain

(a) See Form of Oath, Appendix, No. XII.

(b) It has been held, upon an appeal against an order for the allowance of *Overseer's* accounts, that a magistrate, being a rated inhabitant of the parish, cannot vote, either on the determination

as to the appeal, or on a question as to granting a case for the opinion of the Court of K. B. *Rex v. Gudridge and others*, 5 B. & C. 459.

(c) See Form, Appendix, No. XIII.

the same in his hands, and account for them in his next account, if he shall be continued surveyor of such parish, township, or place, in the succeeding year:—And it shall be lawful for the succeeding surveyor, and he is hereby authorized and required to recover, collect, and receive all such sums of money which shall be due and owing as aforesaid, by all such ways and means, as fully and effectually to all intents and purposes, as the preceding surveyor could, might, or ought to have recovered, collected, or received the same:—And in case such surveyor shall neglect to provide such book or books, or to enter such respective accounts and lists therein, or to deliver the said book or books and such duplicate thereof, and such assessments, tools, materials, implements, and other things, in manner aforesaid, he shall for every such offence forfeit any sum, not exceeding £5 nor less than 40s. (a); And in case he shall make default in the paying or accounting for the money so remaining in his hands, within the time and according to the directions aforesaid, he shall forfeit double the value of the money, which shall be adjudged by the said justices to be in his hands:—And in case any such surveyor shall die before such respective lists and accounts shall be made out, or such monies, books, assessments, tools, materials, and implements, shall be so delivered and paid, the executors or administrators of such surveyor shall make out, pay, and deliver the same, in like manner, and under the like penalty, as such surveyor is hereby required and made subject and liable to:—And every surveyor shall pay to the justices' clerks, for the appointment and charge *one shilling*, for the bond *sixpence*, and for the account so to be examined and taken and for the oath so to be administered *one shilling*,

(a) See Form of Conviction, Appendix, No. XIV.

and no more; and if any person or persons shall receive any greater sum or fee for the business aforesaid, than hereinbefore mentioned, he shall forfeit the sum of *ten pounds* for every offence.

Previously to the above enactment it had been decided (*a*), that the Court of General Quarter Sessions was possessed of no *original jurisdiction* to pass the accounts of surveyors of the highways; but that their authority arose only upon appeal from the Special Sessions, to which the original application must be made. And now it is decided that, by the proper construction of the above clause, they are deprived even of their appellate jurisdiction. In two cases (*b*), both of which arose out of the same transaction, the Court of Quarter Sessions had received an appeal from the decision of the Petty Sessions, as to the surveyor's accounts; and it was held by the Court of K. B. that the Quarter Sessions had no such jurisdiction. The 80th section of the Act, by which it was contended that the right to appeal was given, expressly confines that right to persons aggrieved by any thing done in the execution of the powers given by the Act, *and for which no particular method of relief had been thereby already appointed*. But a specific relief for this case is given by the 48th section. It follows, that as a remedy was already appointed, the 80th section does not give to the Court of Quarter Sessions jurisdiction to receive this appeal; and the Legislature clearly intended, that when the accounts are settled at the Petty Sessions, or by one justice, (as the case may be) the books are to be transmitted to the parish officers, to be

(*a*) *Rex v. Hartshorn*, 2 Burr. 745.

(*b*) *Rex v. Justices of the West*

Riding of Yorkshire, 5 T. R. 629.
and *Rex v. Mitchell and others*,
ib. 701.

kept by them for the use of the parish, and no farther inquiry is to be made into the accounts.

And the jurisdiction to pass the surveyor's accounts is still more narrowed by later decisions. It is now clear, that not even the Petty Sessions possess an *original* jurisdiction in such cases—but can act only on appeal from the single justice, who is directed by the Act to allow the accounts. The mode of proceeding laid down by the Legislature must be strictly adhered to. Therefore the accounts must, in the first place, be produced at a vestry meeting; they must then be carried before such justice as the meeting shall appoint; and afterwards an appeal *against the items objected to* by that justice may be heard at the Petty Sessions, whose decision is to be final.

In one case (a), the accounts were regularly produced at a vestry meeting, and by a resolution of the vestry, the surveyor was directed to submit them to a certain magistrate, to which he assented; but, instead of so doing, he carried his accounts at once to the Special Sessions, when they were allowed by the justices. A rule *nisi* for quashing the order of allowance having been granted by the Court of K. B. (the order being previously brought up by *certiorari*,) was afterwards made absolute; Bayley, J. observing, that, "The reference to the Petty Sessions is merely upon those parts of the account which are not allowed by the single justice; the justices at those Sessions have no original jurisdiction. That being so, the allowance was not in pursuance of the powers given by the statute, and the proceeding was *coram non judice*. I am therefore of opinion, that the *certiorari* was pro-

(a) *Rex v. The Justices of Somersetshire*, 5 B. & C. 816.

perly granted, and that the order of the Petty Sessions for the allowance of the accounts must be quashed."

If the accounts are submitted to the single justice, but so defectively that he is not enabled to form a judgment as to their correctness, it is, of course, little better than not placing them before him at all, and any order made upon such a proceeding by the Petty Sessions, must, according to the principle in the last case, be invalid.

Therefore, where the surveyor exhibited the accounts before one magistrate, but did not take the assessments with him, for which reason the magistrate, being of opinion that it would be impracticable to investigate the accounts without having the assessments laid before him, desired the surveyor to attend with all the necessary documents at the Petty Sessions. The surveyor attended there, and the accounts were examined and allowed by the justices. The order of the Petty Sessions was, however, quashed by the Court of K. B.; and Abbott, C. J. in delivering judgment, said, "The statute certainly requires that the accounts shall be exhibited before one justice, in such a manner as may enable him to exercise his judgment upon them." (a)

General penalty on surveyor.—By Section 50, of Stat. 13 Geo. 3. c. 78, If any surveyor of the highways, after his acceptance of the said office, shall neglect his duty in any thing required of him by this Act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum, not exceeding £5 nor less than 10s., at

(a) *Rex v. The Justices of the North Riding of Yorkshire*, 6 B. & C. 152.

the discretion of the justice or justices having jurisdiction therein.

Not to have an interest in contracts.—We shall see (a), that by the 49th *Section*, any surveyor having a share in contracts without licence, shall forfeit for every offence the sum of £10, and be for ever after incapable of being employed as a surveyor with a salary under the authority of this Act.

II. *Statute Duty; and the power to compound in lieu thereof.*

By the simple provisions of the common law it appears, that the inhabitants of the parish were *to use their endeavours* for the repair of the highways; that is, personal labour, and the contribution of materials and implements of labour, were the only charge upon the occupiers of lands in the parish. To render such a burthen equal upon all, and effective as to the object in view, would be a work of some nicety, and therefore required the intervention of the Legislature. And for this purpose the following enactments have been made.

Proportions of statute labour.—By 34th Geo. 3. c. 74. s. 4. The said surveyor to be appointed by the said Act (b), together with the inhabitants and occupiers of lands, tenements, woods, tithes, and hereditaments within each parish, township, or place, shall, at proper seasons in every year, use their endeavours for the repair of the highways, and shall be chargeable thereunto as followeth: (that is to say) Every person keeping a waggon, cart, wain, plough, or tumbrel, and three or more horses or

(a) Post, p. 159.

(b) 13 Geo. 3. c. 72.

beasts of draught used to draw the same, shall be deemed to keep a team, draught, or plough, and be liable to perform statute duty with the same in the parish, township, or place, where he resides, and shall, six days in every year, (if so many days shall be found necessary) to be computed from Michaelmas to Michaelmas, send on every day and at every place to be appointed by the surveyor, for the amending the highways in such parish, township, or place, one wain, cart, or carriage, furnished, after the custom of the country, with oxen, horses, or other cattle, and all other necessities fit to carry things for that purpose, and also two able men with such wain, cart, or carriage; which duty so performed shall excuse every such person from his duty in such parish, township, or place, in respect of all lands, tenements, woods, tithes, or hereditaments, not exceeding the annual value of £50, which he shall occupy therein: And every person keeping such team, draught, or plough, and occupying in the same parish, township, or place, lands, tenements, woods, tithes, or hereditaments, of the yearly value of £50, over and beyond the said yearly value of £50, in respect whereof such team duty shall be performed; and every such person occupying lands, tenements, woods, tithes, or hereditaments, of the yearly value of £50, in any other parish, township, or place, besides that wherein he resides; and every other person not keeping a team, draught, or plough, but occupying lands, tenements, woods, tithes, or hereditaments, of the yearly value of £50, in any parish, township, or place, shall in like manner respectively, and for the same number of days, find and send one wain, cart, or carriage, furnished with not less than three horses or four oxen, and one horse or two oxen, and two horses and two able men to each wain, cart, or carriage, and in like manner for every £50 per annum respectively, which every such person shall further

occupy in any such parish, township, or place respectively; such wains, carts, or carriages to be employed by the surveyor in the repairing and amending the highways within the parish, township, or place, where such lands, tenements, woods, tithes, or hereditaments shall respectively lie: Provided that no person keeping such team, draught, or plough, and performing duty with the same as aforesaid in the parish, township, or place, where he resides, and not occupying lands, tenements, woods, tithes, or hereditaments within the same, of the yearly value of £30, shall be obliged to send more than one labourer with such team, draught, or plough.

And by *Section 2*, of the same Act, Every person who shall not keep a team, draught, or plough, but shall keep one or more cart or carts, and one or two horses or beasts of draught, only used to draw in each of such carts upon the highways, shall be obliged to perform his statute duty for the like number of days with such cart or carts, and horse or horses or beasts of draught, and one labourer to attend each cart, or to pay for the lands, tenements, woods, tithes, and hereditaments which he shall occupy according to the rate hereinafter mentioned, at the option of the surveyor; And every person who shall keep a coach, post-chaise, or chair, or other wheel-carriage, and not keep a team, draught, or plough, nor occupy lands, tenements, woods, tithes, or hereditaments, of the annual value of £50 in the parish, township, or place, where he shall reside, shall pay to the surveyor one shilling in respect of every such day's statute duty for every horse which he shall draw in any such carriage, or shall pay according to the value of the lands, tenements, or hereditaments which he shall occupy, according to the rate hereinafter mentioned, at the option of the surveyor;—And if the said teams, draughts, or ploughs,

or any of them, shall not be thought needful by the surveyor on any of the said days, then every such person who should have sent any such team, draught, or plough according to the directions aforesaid, shall, according to the notice to be given as hereinafter directed, send unto the said work for every one so spared three able men, there to labour as aforesaid, or pay to the said surveyor the sum of four shillings and sixpence in lieu thereof, at the option of the surveyor; and all such persons as aforesaid shall respectively have and bring with them such shovels, spades, picks, mattocks, and other tools and instruments as are useful and proper for the purposes aforesaid:—And all the said persons and carriages shall diligently perform the work and labour to which they shall be appointed by such surveyor, for eight hours in every of the said days, within such parish, township, or place, or in getting and carrying materials in and from any other parish, township, or place, to be employed in the repair of the highways of the parish, township, or place for which they shall be required to perform such duty and labour as aforesaid;—And if any person sending a team as aforesaid, shall not send a sufficient labourer, besides the driver (except as before mentioned), or if any such labourer or driver, or the driver of any cart required to perform statute duty as aforesaid, shall refuse to work and labour during the time above mentioned, according to the directions of the surveyor, or if any driver shall refuse to carry proper and sufficient loads, it shall and may be lawful for such surveyor to discharge every such team, cart, or labourer, and to recover from the owner of every such team or cart, the forfeiture which every such person or persons would have incurred by virtue of the said Act, in case no such team, cart, or labourer respectively had been sent.

Surveyor may call for part of a team, &c.—And by s. 36 of 13th Geo. 3. c. 78, It shall be lawful for the surveyor, where the employment for teams is of such sort that two horses will be sufficient for one cart, or where a stand cart with one horse shall be necessary, to call upon any person liable to send a team, or draught, or plough by virtue of this Act, who keeps one or more cart or carts, and three or more horses, to send such cart or carts, horse or horses, to perform his statute duty, as the surveyor shall find most convenient and shall direct; and the surveyor shall allow every such stand cart and one horse as half-a-team, and every cart and two horses as two-thirds of a team; and if a waggon shall be found necessary for any particular business, the surveyor may require the duty or any part thereof to be performed with such waggon by any person who keeps one; which directions of the surveyor shall be observed, or the person liable to perform such duty shall forfeit such sum, as the duty so required of him shall bear in proportion to the forfeiture hereby inflicted for every neglect in performing duty with a team, draught, or plough.

Notice to be given. Penalty in default of performing statute duty.—By Section 37, of the last-mentioned Act, Every such surveyor shall, from time to time, give to or cause to be left at the house or usual place of abode of every person or persons so liable to perform such duty or labour as in this Act directed, four days' notice (a) at the least of the day, hour, and place upon which each of the said days' duty shall be required to be performed:

(a) See Form, Appendix, No. XV. This notice must express the particular days; and it is not sufficient to require the work to

be done between such a day and such a day.—Regina v. Kime, 2 Lord Raym. 858.—1 Salk. 357. S. C.

And every person or persons making default (a) in finding and sending each wain, cart, or carriage, furnished as aforesaid, and such able men with the same as herein required, or in performing the said duty at the time and place and in the manner by this Act directed, shall for every such default or neglect in sending such wain, cart, or carriage, with such men as aforesaid, forfeit the sum of ten shillings; and for every default in sending every cart with one horse and one man, three shillings; and for not sending every cart with two horses and one man, five shillings; and every person or persons making default in sending any such labourer, and every person making default in performing such labour, at the time and place and in the manner directed by this Act, or in paying such composition-money for the same as herein mentioned, shall for every such neglect forfeit the sum of one shilling and sixpence;—All which forfeitures shall be applied for the use of the highway within the parish, township, or place where the same shall arise:—And the said surveyor shall fairly and equally demand and require such duty and labour from every person or persons liable to perform the same, according to the directions of this Act, without favor or partiality to any person or persons whomsoever;—And if in any parish, township, or place, it shall not be necessary to call forth the whole duty in any year, it shall be abated in a just and equal proportion amongst all persons liable to the same;—And the said surveyor may and shall and he is hereby required, with all convenient speed, after default made in performance of such duty or labour as aforesaid, to proceed for the recovery of the penalties or forfeitures hereby inflicted for the same respectively, in manner hereinafter directed,

(a) See 54 Geo. 3. c. 109. s. 7. Post, p. 134.

so that the same may be recovered before he makes up his accounts, in the manner directed by this Act.

Justices may direct team-duty to be performed in kind, and may order labourers to work, &c.—It is provided by s. 6 of Stat. 34 Geo. 3. c. 74, That if it shall appear to the justices at their Special Sessions to be held in the week next after Michaelmas Quarter Sessions (*a*), or at any other Special or Petty Sessions held within the limits of any parish, township, or place, at which two or more justices shall be present, that from the directions hereinbefore given for the performing and compounding the statute duty (*b*), there will be difficulty in procuring the necessary carriage or a sufficient number of labourers for the repair of the highways in any particular parish, township, or place within their respective limits, without paying high and extravagant prices for the same, it shall be lawful for such justices to order (*c*) and direct the team-duty, or so much thereof as they shall think fit, to be performed in kind within every such parish, township, or place, except in respect of such teams as belong to persons who do not occupy lands, tenements, woods, tithes, or hereditaments of the annual value of £30 within the same; and also to order all such persons as shall gain their living by the wages of daily labour, or such part of them as they shall think fit, to perform six days' labour upon such highways in kind, either by themselves or other sufficient labourers, in case so many days' duty shall be required, upon being paid for such labour the usual and customary wages given to labourers in such parish, township, or place:—Provided that if part of

(*a*) See, as to these Sessions, ante, p. 106.

see post, page 137, et seq.

(*b*) For the provisions as to the compounding for statute duty,

(*c*) See Form, Appendix, No. XVI.

such teams or labourers only are required, it shall be directed by the said order of the justices, in some given proportion, as one-half, third, or fourth part thereof; and the surveyor shall in that case, at a public vestry for such parish, township, or place, put the names of all the persons, liable by this Act to send such teams, into one hat or box, and the names of all the persons liable to perform such labour into another hat or box, and some inhabitant then present shall draw out such number from each as shall be equal to the proportion so ordered by the said justices, and the persons so drawn shall perform such duty in kind for that year;—And that if any such order shall be made or continued in the subsequent year, the same method shall be observed, but the names drawn in the preceding year shall not be put into such hat or box; and in every succeeding year such method and regulation shall be observed by such surveyor, as to render the duty so required to be performed in kind as equal amongst the several persons liable thereto as may be;—Which order of the said justices, so far as the same shall be extended, shall supersede the said power or liberty of compounding (a), and shall be binding and effectual to all intents and purposes whatsoever; and shall continue in force until it shall be discharged or varied by the justices at some subsequent Special Sessions for the highways within such limit, to be held in the week next after Michaelmas Quarter Sessions; any thing herein contained to the contrary thereof in any wise notwithstanding.

In the exposition of the former statutes upon this subject, the language of which is, with little variation, pursued in the above enactments, the following opinions have been holden (b).

(a) See post, p. 137, et seq.

(b) See 1 Hawk. c. 76. s. 40 to 45.

1st (a). That persons in holy orders are within the purview of them in respect of their spiritual possessions, as much as any other persons whatsoever, in respect of any other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others.

2dly (b). That he who keeps several draughts in a parish is bound to send a team for each draught, whether he occupy any land in the parish or not; and in like manner, that he who occupies several plough-lands ought to send a team for each plough-land, whether he keeps any draught or not.

N. B. Dalton is of opinion, that he who keeps a draught and but two horses, ought to attend therewith at the times appointed; and that, if he carry with them such loads as they are able to draw, he shall be excused.

3dly (c). That notwithstanding the words of the statute extend only to the occupiers of land, yet if the owner neither occupy them nor let them, but suffer them to lie fresh, he shall be charged as much as if he had occupied them; for there is no reason that the public shall suffer for his negligence.

4thly (d). That it is no excuse for the inhabitants of a parish, lying indicted at common law for not repairing the highways, that they have done the full work required of them by statute; for since these statutes are wholly in the affirmative, and made in aid of the common law and to supply the defects thereof, they shall not be construed to abrogate any provision thereby made for these purposes.

(a) 3 Keb. 255. 476.—1 Ventr. 273.—Watson, 40.—2 Inst. 704.—And see *Rex v. Lacy*, 5 B. & C. 703, and post.

(b) Raym. 186.—3 Keb. 567.

468. 568.—Vide Dalt. c. 26.—2 Keb. 617.

(c) Palm. 389.—2 Roll. 412.

(d) Dalt. c. 26.

5thly (a). That the inhabitants of a parish into which a road is turned by turnpike trustees, are not bound to do statute work thereon. But by 13 Geo. 3. c. 84. s. 60 (b), the surveyors of turnpike roads may, when necessary, enforce the powers given by the Highway Act.

Exemptions from statute labour.—By Stat. 42 Geo. 3. c. 90. s. 174, No serjeant, corporal, or drummer of the militia, nor any private man, from the time of his enrolment until his discharge, shall be compelled to perform any highway duty, commonly called statute work.

Penalty for neglect to perform statute duty.—By Stat. 54 Geo. 3. c. 109. s. 7, All persons who shall refuse or neglect to perform any part of their statute duty in kind, on being regularly summoned by the surveyor for that purpose, shall forfeit and pay a sum, equal to twice the amount of the composition for such statute duty as they shall have so neglected or refused to perform, according to the rates fixed by the justices under the provisions of this Act; and the said persons shall also be liable to perform the said statute duty, which they have so neglected or refused to perform, either in the same or in the following year; the payment of such forfeitures and the arrears of such statute duty to be enforced and applied to the benefit of the highway or turnpike road to which the original neglected duty was due or owing by the surveyor for the time being, and under the same regulations and in the same manner as other forfeitures may be levied, and statute duty may in other cases be enforced by any of the provisions of any of the said hereinbefore recited Acts.

(a) *Wheeler v. Cooper*, 1 Bla. Rep. 603.

(b) Statute labour upon turn-

pike roads is now provided for by 4 Geo. 4. c. 95. s. 80.

In a conviction for the non-performance of statute duty, it was stated that J. F. (the party convicted) was served with a notice, whereby he was required to do certain statute duty specified in the conviction, *or* compound for the same two days before the time appointed for doing the work, and that the said J. F. (although liable to the same by reason of his occupation, &c.) neglected to attend and perform such statute duty, contrary to the statute. The conviction proceeded to declare a certain sum forfeited. It was objected to this conviction, that the order was to perform the statute work *or* compound for it; whereas the conviction is for not performing the work, and does not mention the composition. And it was argued that it is consistent with all that appears upon the conviction, that the plaintiff might have compounded for the statute work. But the objection was over-ruled. *Per* Lord Tenterden, C. J. "By the Highway Act, certain statute duty is required to be performed by all persons occupying land and keeping a team. There is also a provision, that parties may relieve themselves from the performance of this duty by paying certain sums, to be appointed by the justices, who may, however, refuse to allow this relief, and insist upon having the statute work performed. That power was not acted upon in this instance; the surveyor gave notice to the plaintiff to do the work, *or* compound for it. If he had paid the composition, that would have been a good defence to the charge of neglecting to perform the work; but it was matter of defence only, and the proceeding for non-performance of the work was correct" (a).

Another objection was also taken to the same conviction, and over-ruled, *viz.* that it was not alleged in the

(a) *Fawcett v. Fonlis*, 7 B. & C. 394.

stances, be injurious to the party liable, without being of proportionate advantage to the public. The Legislature has, therefore, made several regulations, whereby the duty may be compounded for in money. A power, however, is given to the justices to require absolutely the performance of labour in kind, or a composition in money in lieu thereof, whenever either shall appear to be most beneficial to the repair of the highways.

As to the power to compound, and as to the amount of the composition for statute labour.—By Stat. 13 Geo. 3. c. 78. s. 38, It is declared that persons liable to perform statute duty may, if they think fit, compound for the same for such sums as the justices shall think fit, not exceeding the several amounts therein specified. But the amount and mode of ascertaining this composition is altered and further regulated by the stat. 44 Geo. 3. c. 52. and 54 Geo. 3. c. 109.

By the 2d Section of 44 Geo. 3. c. 52, Any person or persons liable to perform statute duty, by sending one or more team or teams, draught or draughts, plough or ploughs, with men, horses, or oxen, in manner in the said recited Act of the 34th year of his present Majesty's reign mentioned, may compound for the same if he, she, or they shall think fit, by paying to the surveyor of the highways, at the time and in the manner in the said Act of the 13th year of his present Majesty's reign (a) mentioned, such sum or sums of money, as the justices of the peace for the limits wherein the parish, township, or place, for which the said duty is liable to be performed, is situate, or the major part of them at their Special

(a) See 13 Geo. 3. c. 78. s. 41., post, p. 148.

Session to be held in the first week after Michaelmas Quarter Sessions (a) in every year, shall adjudge and declare to be reasonable, not exceeding twelve shillings, nor less than three shillings for each team, draught, or plough, for each day; and in default of their adjudging and declaring the same, the sum of six shillings for and in lieu of every day's duty for each team, draught, or plough: And for each cart with two horses, or beasts of draught, not exceeding eight shillings, nor less than three shillings; and in default of their adjudging and declaring the same, the sum of four shillings: And for each cart with one horse, or beast of draught, not exceeding six shillings nor less than two shillings; and in default of their adjudging and declaring the same, the sum of three shillings.

By *Stat. 54 Geo. 3. c. 109. s. 4*, In all cases in which it shall be made to appear to two or more justices of the peace acting within the district, by the surveyors of the highways, or of any turnpike road (b), that the maintenance and repair thereof can be more effectually carried on by a composition in money than by a performance of the statute duty in kind, he or they shall be at liberty to require such composition in money, upon receiving an authority (c) under the hands and seals of the said justices for that purpose, in lieu of either the whole or of any certain part of the statute duty, from the several persons who are bound by law to perform such statute duty:—And the justices of the district, at their Special Sessions for the highways held in the week next after Michaelmas yearly, shall fix such rates as they shall adjudge reasonable, as a composition in lieu of the teams,

(a) See ante, p. 108.

(b) See Form, Appendix, No. XVIII.

(c) See Form, Appendix, No. XIX.

carts, horses, oxen, or labour, which such persons are bound in the proportions now fixed by law to provide and perform; which rates the said justices are hereby authorized and required annually to make known at such Special Sessions, due regard being had to the actual wages of labour, and to the actual rate of hiring teams, draughts, ploughs, carts, horses, or oxen, in the parish, place, or district, in which such composition is required; and such composition shall be paid in the same manner, and within the same period and subject to the same regulations and provisions, as are now by law established for enforcing the payment of compositions in lieu of statute duty:— Provided always, that in case where the whole composition in money shall not be required in lieu of the whole of the duty in kind, such composition shall be demanded in fair and equal proportions from each and every person liable to pay the same, unless any of the said persons shall prefer to pay a composition for the whole of their statute duty, according to the rates fixed in the manner herein directed.

In the case of *Stanley v. Fielden and Others (a)*, to an action of trespass, a justification was pleaded under a warrant of distress, to levy a composition in lieu of statute duty, due from the plaintiff as occupier of lands in the township of Hooton. At the trial at the assizes for Chester, it appeared, that two magistrates authorized the surveyor of a turnpike road, which ran through twenty-nine townships, to collect for the repair of the road a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of sixpence in the pound upon the annual value of the lands of the township of Hooton, through which the

(a) 5 B. & A. 425.

turnpike road passed. The sum to be collected under this assessment was the utmost which the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in their township into complete repair. The turnpike surveyor, having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal by the plaintiff to pay the sum assessed upon him, as an inhabitant of the township, two magistrates granted a warrant of distress to levy the same. It was objected by the Counsel for the defendants, on the plaintiff's case being closed, that there ought to be a nonsuit, inasmuch as the warrant must be considered *prima facie* evidence of all the facts therein stated; and if so, then it appeared that by an assessment pursuant to an order of two justices, according to the directions of the statute, the plaintiff was charged with the sum therein mentioned, and refused to pay it; and that this must be taken to be an adjudication, binding and valid, until regularly quashed. The learned Judges refused to nonsuit the plaintiff, but reserved the point. Upon the facts of the case, the Chief Justice stated to the jury, that upon the evidence, it had not been made to appear by the surveyors of the roads to the justices, that a composition in lieu of statute duty was necessary; that the surveyor ought at all events to have been examined in the presence of both the magistrates, whereas in fact one only had examined him, and communicated the information to the other; and as the result of the inquiry was to affect the property of many persons, it was fit that, if not on oath, it should at least be of a satisfactory nature. The jury found a verdict for the plaintiff. A rule nisi, for a nonsuit or a new trial, was granted by the Court of K. B.; but at the time the Lord Chief Justice (Abbott) said,

that the opinion of the Court was then very strong, that wherever an Act of Parliament required justices to take certain steps on some matter being made to appear to them, that matter must be made to appear to them on oath.

Upon the motion coming on, and after the case had been argued, the Court gave their judgment in favor of the plaintiff. *Per Abbott, C. J.* " Before it can be ascertained how much any individual ought to pay as a composition in lieu of statute duty, it must be ascertained, in some manner and by some competent authority, how many days labour will be required to repair the road. Now that certainly has not been done, in distinct terms, in this case. It appears upon the evidence, that the turnpike surveyor, having first required, from the surveyor of the highways of the township, a list of the several persons liable to statute duty, made an assessment at the rate of sixpence in the pound upon the whole annual value returned. He seems to have taken it for granted, that he was entitled to require from the several townships through which the road passed, a composition for the whole statute duty which, by law, he was entitled to demand, whatever the state of the roads might be. Now, I am of opinion, that he had no such right. If there were no such composition, the inhabitants of the several townships could only be called upon to do so many days' statute duty as would be absolutely necessary for the repair of the roads; and if a composition be called for instead of the statute duty, that composition ought to be an equivalent for that number of days' statute duty. I think, therefore, in this case, that before the demand was made upon the plaintiff, it ought to have been ascertained, by persons having competent authority for that purpose, that so many days' statute duty would be re-

quired to put the road in question into a complete state of repair, and that it ought to have been notified to the inhabitants of the parish or township, that the composition required of them, of sixpence in the pound upon the annual value of their lands, was calculated upon the principle that it would require so many days' statute duty to repair the road. That not having been done in this case, I think, that the justices had no authority whatever to issue the warrant, and consequently that this rule must be discharged." And *per Bayley, J.* "A magistrate is not to be answerable for granting a warrant, if at the time of granting it he has documents before him (which are the acts of other magistrates) from which it appears he was justified in granting the warrant. But if the want of jurisdiction is manifest from all the proceedings before him at the time, then he grants the warrant at his peril."

In the above case Mr. Justice *Bayley* said, "I think that the magistrates ought, in the exercise of their discretion, on the face of the authority itself to have shewn, that, in their opinion, in each particular township a composition in lieu of statute duty was adviseable." And he added, "I also strongly incline to think, though upon that point I do not mean to intimate any decided opinion, that it should be made to appear *upon oath* to both the magistrates present that a composition was adviseable."

In a case, however, which arose upon a neglect to perform statute duty, for which a penalty had been levied upon the plaintiff, his Counsel objected to the conviction, that there was no allegation therein that statute duty in kind was necessary: to which objection Lord *Tenterden*, C. J. answered, "That must have been ascertained be-

fore the surveyor's requisition, and must, therefore, be presumed." (a)

By *Stat.* 13 Geo. 3. c. 78. s. 42, It is provided, That in every parish, township, or place, where any person shall keep a draught or plough, and no carriage, he shall pay to the surveyor the sum of one shilling for every horse, or pair of oxen, or neat cattle, used in such draught or plough, for every day's statute duty, on the day such statute duty is required to be performed; or pay according to the rate aforesaid (b), for the lands, tenements, woods, tithes, and hereditaments, which he shall occupy in such parish, &c., at the option of the surveyor.

Composition upon the annual value of land, &c. in occupation.—And by *Stat.* 54 Geo. 3. c. 119. s. 5, All persons who are liable, under any of the provisions of any of the hereinbefore recited Acts (c), to contribute to the repair of the highways, by a payment of money in lieu of statute duty, shall contribute thereto in lieu of every day's statute duty, for every twenty shillings of the actual annual value, at the time of making the said assessment, of the lands, tenements, woods, tithes, and hereditaments, which such persons shall respectively occupy in the parish, township, or place, where they reside, or in any other parish, township, or place, a sum equal to one-fiftieth part of the sum fixed by the justices, at the time and in the manner by this Act directed, as the composition for one day's labour of a cart, wain, or carriage, furnished with three horses and two able men, omitting

(a) See 7 B. & C. 396, Fawcett v. Foulis.

the 54 Geo. 3. c. 109. s. 5.

(b) This is now regulated by

(c) 13 Geo. 3. c. 78.—54 Geo. 3. c. 74—and 44 Geo. 3. c. 52.

any fractional part of the said sum which does not amount to one farthing; And all persons occupying more than £50 per annum in the parish, township, or place, wherein they reside, or in any other parish, township, or place, and less than £100 per annum, shall contribute to the repairs of the highways, in lieu of every day's statute duty, for every twenty shillings of the actual annual value, at the time of making the said assessment, of the lands, tenements, woods, tithes, and hereditaments, which such person shall respectively occupy, over and beyond the said sum of £50 per annum and under £100, a sum equal to one-fiftieth part of the sum fixed by the said justices, at the time and in the manner by this Act directed, as the composition for one day's labour of a cart, wain, or carriage, furnished with three horses and two able men, omitting any fractional part of the said sum which does not amount to one farthing; and so on progressively for every twenty shillings of the actual annual value of the lands, tenements, woods, tithes, and hereditaments which they shall respectively occupy over and beyond every additional £50 per annum;—and the said sum or sums shall be paid in the same manner and within the same period and subject to the same regulations and provisions, as are now by law established for enforcing the payment of composition in lieu of statute duty.

And by *Section 6*, Every person who shall keep a coach, post-chaise, chair, or other wheel carriage, and not keep a team, draught, or plough, nor occupy £50 per annum in the parish, township, or place, where he resides, shall pay to the surveyor or surveyors in respect of every day's statute duty, for every horse which he or she shall use in drawing such carriage such a sum as the justices shall, at the time and in the manner by this Act directed, fix, as the composition for one day's work of a horse; or

shall, at the option of the surveyor or surveyors, pay in lieu of every day's statute duty for every twenty shillings of the actual annual value of the lands, tenements, woods, tithes, and hereditaments which he or she shall respectively occupy, a sum equal to one-fiftieth part of the sum fixed by the justices, at the time and in the manner by this Act directed, as the composition for one day's labour of a cart, wain, or carriage, furnished with three horses and two able men, omitting any fractional part of the said sum which does not amount to one farthing; and the said sum or sums shall be paid in the same manner, and in the same period, and subject to the same regulations and provisions, as are now by law established for enforcing the payment of compositions in lieu of statute duty.

Mode of enforcing payment of composition, upon the annual value of land, &c.—By Statute 34 Geo. 3. c. 74. s. 4. (a), All which said several sums shall be considered as compositions, and shall be paid to the surveyor at the time the compositions are to be paid under the authority of the aforesaid Act, or within ten days after; or in default of such payments the surveyor shall apply to a justice acting for such district, who shall summon such defaulter to appear at some Special or Petty Sessions to be holden for such district, at which two justices at the least shall be present, to show cause why he refused or neglected to pay; and in default of appearance, or if on appearance he shall not make it appear to the satisfaction of such justices that

(a) The remedy contained in this clause appears to be applicable only to enforce the payment of compositions, which are levied upon the occupiers of land, who

shall not keep a team, draught, or plough; and does not embrace the case of a composition in lieu of actual statute labour.

he is poor and indigent, and as such an object deserving relief, such money shall be levied by distress, in like manner as the forfeitures for neglect of statute duty:— Provided, that when on application as aforesaid the justices shall discharge any poor and indigent person from payment of such rate or composition-money, such person shall at the same time be discharged from any expences in consequence thereof.

Indigent persons may be excused from payment.—And by *Section 5*, of the same Act, after reciting that it may frequently happen that persons wholly gaining their livelihood by the wages of daily labour, and occupying rateable tenements, by reason of age, sickness, a numerous family or misfortune, may be in poor and indigent circumstances, and it may be expedient in certain cases to discharge such persons from all rates, assessments, or composition whatsoever; it is enacted, that on the application of any such person to two justices, at any such Special or Petty Sessions, such justices (having first given notice (a) to the surveyor to appear on the part of the parish, township, or place,) shall examine into the situation and circumstances of the person making such application; and if it shall appear to the satisfaction of such justices that he is really poor and indigent and deserving such relief, they may exempt him from all such rates, assessments, or compositions.

Justices may mitigate composition to persons occupying under £30 per annum.—By *Sect. 40*, of *Stat. 13 Geo. 3. c. 78*, It is provided, That if any person or persons, who shall keep a team, draught, or plough, and shall not occupy lands, tenements, woods, tithes, or hereditaments,

(a) See Form, Appendix, No. XX.

to the value of £30 per annum, in the parish, township, or place where he shall reside, but shall in part maintain his horses and beasts of draught used in such team upon or from lands which he shall occupy in one or more adjacent parish or parishes, it shall be lawful for the said justices, at some Special Sessions, to mitigate and reduce the duty or composition so required to be performed or paid by such person or persons, in such manner and to such sum as they shall think just and reasonable.

As to the notice to be given of the time of compounding,—and as to a change of occupation during the year.— By Section 41, It is provided, That the said surveyor of every parish, township, or place, shall, on some Sunday in November in every year, cause ten days notice (a) at the least to be given in the church or chapel of such parish, township, or place; and if there be no church or chapel, or no service performed therein, then at the most public place there, and repeat the like notice, in such church, chapel, or place, on the next succeeding Sunday, of the time and place when and where the persons permitted under the authority of this Act, and inclined to compound for the said duty in manner aforesaid, may signify to such surveyor their intention to compound; and all and every person or persons signifying the same, who shall then, or within the space of one calendar month afterwards, pay to such surveyor the composition authorized and allowed by this Act, shall be discharged from the performance of such duty; which composition-money shall be employed by the surveyor for the use of the highways; and that no composition shall be permitted, unless the same shall be paid at the day, or within the time aforesaid:—But in cases where the occupation of any lands,

(a) See Form, Appendix, No. XXI.

tenements, woods, tithes, or hereditaments, shall be changed, or any new occupant or inhabitant shall come to reside in such parish, township, or place, after the time appointed for such composition, then the person or persons occupying such lands, tenements, woods, tithes, or hereditaments, or so residing in such parish, township, or place, shall be allowed to compound in manner aforesaid: Provided he, she, or they, shall pay the said composition-money to the said surveyor within fourteen days after he, she, or they, shall enter upon such lands, tenements, or hereditaments, or shall come to reside in such parish, township, or place;—And every tenant or occupier of any lands, tenements, woods, tithes, or hereditaments, who intends to quit the possession thereof within six calendar months from the time fixed for making such composition, shall and may compound for half the duty hereby required, and the succeeding tenant or occupier shall and may, in that case, compound, or perform the duty in kind for the other half thereof:—And if the surveyor shall receive from any person or persons a composition for more duty than shall be required from the other inhabitants and occupiers within the same parish, township, or place, for the same year, he shall repay such extraordinary composition-money to such person or persons, so as to bring the duty to an equality amongst all such inhabitants and occupiers.

Proportion of composition to be paid to treasurer of Turnpike Roads.—And by Section 44, After reciting, that by several Acts of Parliament concerning turnpike roads, a certain part of the duty called Statute Duty is or may be directed to be performed on such roads, and it may happen in some places that the several persons liable thereto may have compounded for the same: It is enacted,

That in all such cases, the surveyor of the highways of the parish, township, or place, where such composition shall have been made, shall pay to the treasurer or surveyor of such turnpike roads, a certain part of the composition-money so received, to be proportioned according to the number of days' duty which such person or persons was or were liable to perform on such turnpike road; which money shall be laid out and expended on such part of the said turnpike road as lies within the parish, township, or place, from which it was received, and not elsewhere:—And if such surveyor of the highways shall refuse or neglect to pay to the treasurer or surveyor of such turnpike road such part of the said composition-money so received by him, within twenty days after he shall have received the same, upon demand made by such treasurer or surveyor, the same shall and may be levied upon the goods and chattels of such surveyor, in such manner as penalties and forfeitures are by this Act authorized to be levied.

We have seen (a), that by *Stat. 34 Geo. 3. c. 74. s. 6*, The justices are authorized, when circumstances shall require, to order team-duty to be performed in kind, and also to order labourers to work upon the highways on payment of the usual wages.

III. *The procuration of materials for the repair of highways.*

Power to get materials (being rubbish) from quarries, and from waste lands, &c. making satisfaction only for the damage done in carrying away the same.—By Stat. 13 Geo. 3. c. 78. s. 27, For the better repairing and

(a) Ante, p. 131.

keeping in repair the said highways, and providing of materials for that purpose, it shall be lawful for every surveyor, to take and carry away, or cause to be taken and carried away, so much of the rubbish or refuse stones of any quarry or quarries, lying and being within the parish, township, or place, where he shall be surveyor, (except such as shall have been got by the surveyor of any turnpike road) without the licence of the owner or owners of such quarries, as they shall judge necessary for the amendment of the said highways, but not to dig or get stone in such quarry without leave of the owner thereof; And also that it shall be lawful for every such surveyor, for the use aforesaid, in any waste land, or common ground, river, or brook, within the parish, township, or place for which he shall be surveyor, or within any other parish, township, or place wherein gravel, sand, chalk, stone or other materials, are respectively likely to be found, (in case sufficient cannot be conveniently had within the parish, township, or place, where the same are to be employed, and sufficient shall be left for the use of the roads in such other parish, township, or place,) to search for, dig, get, and carry away the same; so that the said surveyor doth not thereby divert or interrupt the course of such river or brook, or prejudice or damage any building, highway, or ford, nor dig or get the same out of any river or brook within the distance of one hundred feet above or below any bridge, nor within the like distance of any dam or wear; and likewise to gather stones lying upon any lands or grounds within the parish, township, or place, where such highway shall lie, for such service and purpose; and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways,

without making any satisfaction for the said materials;—but satisfaction shall be made for all damages done to the lands or grounds of any person or persons by carrying away the same, in the manner hereinafter directed for getting and carrying materials in inclosed grounds;—but no such stones shall be gathered without the consent of the occupier of such lands or grounds, or a licence (a) from a justice of the peace for that purpose, after having summoned such occupier to come before him, and heard his reasons, if he shall appear and give any, for refusing his consent.

Not to extend to beach.—By Section 28, It is provided, That nothing in this Act contained, relative to the gathering or getting of stones, shall extend to any quantity of land (being private property) covered with stones thrown up by the sea, commonly called Beach.

Power to get materials from inclosed lands, upon making satisfaction for the same.—By Section 29, It shall be lawful for every such surveyor, for the use aforesaid, to search for, dig, and get, sand, gravel, chalk, stone, or other materials, if sufficient cannot conveniently be had within such waste lands, common grounds, rivers or brooks, in and through any of the several or inclosed lands or grounds of any person or persons whomsoever, within the parish, township, or place, where the same shall be wanted;—or by licence (b) from two justices of the peace at a Special Sessions, within any other parish, township, or place adjoining or lying near to the highway for which such materials shall be required, if it shall appear to such justices that sufficient materials cannot be conveni-

(a) See Forms, Appendix, Nos. XXII. XXIII. XXIV.

(b) See Form, Appendix, No. XXII.

ently had in the parish, township, or place, where such highways lie, or in the waste lands, or common grounds, rivers, or brooks, of such adjacent parish, township, or place, and that a sufficient quantity of materials will be left for the use of the parish, township, or place where the same shall be (such lands or grounds not being a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation;)—and to take and carry away so much of the said materials, as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways; the said surveyor making such satisfaction for the damage to be done to such lands or grounds, by the getting and carrying away the same, as shall be agreed upon between him and the owner, occupier, or other person interested in such lands or grounds respectively, in the presence and with the approbation of two or more substantial inhabitants of such parish, township, or place;—and in case they cannot agree, then such satisfaction and recompence shall be settled and ascertained by order of one or more justice or justices of the peace, of the limit where such land or ground shall lie;—and in such places, where, from the want of other materials, burnt clay may be substituted in the place thereof, it shall be lawful for the surveyor to dig clay in such places as he is hereby authorized to dig chalk or gravel, and to dry the same upon the lands adjoining, and to burn the same upon any waste lands or common grounds, and to carry such clay in such manner as other materials are allowed to be carried by this Act, upon making such satisfaction for the damages within the several inclosed lands or grounds where such clay shall be placed or carried, as herein directed with regard to other materials:—provided, that when the owner of any such inclosed lands shall have occasion for any such ma-

materials lying within the same for the repair of any highway or other roads or ways upon his estate, or which he shall be under obligation to repair, and shall give notice to such surveyor, that he apprehends there will not be sufficient for those purposes, and also for the use of the public highways; then and in every such case the surveyor shall not be permitted to dig or take such materials, without the consent of such owner, or an order of two justices of the peace, after having summoned and heard the said owner or occupier, or his steward or agent; which justices are hereby authorized to inquire into the nature and circumstances of the case, and to permit or restrain such power, in such manner and under such directions, as to them shall seem just.

Upon a prior enactment, which is substantially the same as the above clause, it hath been adjudged, (a)

1st. That an order of Sessions must shew, that there were no proper materials to be found in or upon the wastes or common grounds near the highway; for the surveyors are not warranted to dig in the private soil for all the species of materials, because *some* of these species are not to be found in or upon the said wastes or common ground: and that it ought to specify what cannot be found in or upon the wastes or common grounds, and what may be found in the private soil, and that they must previously know that it is to be found there; or at least have a reasonable prospect of finding it there, for that they cannot dig to try for it in the private soil.

2dly. That an order of Sessions to dig generally is bad; for they must fix upon a particular part, and not leave it to the discretion of the surveyor.

(a) See 1 Hawk. P. C. c. 76. s. 119, &c.—*Rex v. Manning*, 1 Burr 382.

3dly. That satisfaction must be awarded to the owner, or to the occupier, or to both, according to the damages sustained by the one, or by the other, or by both.

4thly. That notice to the occupier is sufficient, and it is sufficient to state, that it was left at his place of abode,

In the case of *Boyfield v. Porter* (a), the plaintiff brought *trespass* against the surveyors of the highways for entering his close, called Coy's Close. At the trial at Nisi Prius, it appeared, that there was a stone-pit in the Vicar's Close (next but one to Coy's Close, but in the opposite direction from that part of the road to which the materials for repair were to be carried,) out of which there was an old carriage-way leading, though somewhat circuitously, to that part of the highway which was under repair; but that the defendants had forsaken the old way, and had broken up the plaintiff's close, and had made a new way over it into the highway (b), and had for that purpose cut down his fence and put up a gate. The defendants having paid twenty-four shillings into Court under the 79th section of the Act, the question between the parties was upon the sufficiency of the amends. The defendants contended for a nonsuit, as the Act authorized the obtaining the refuse stone, and carrying it over the plaintiff's land to the road under repair, subject to a satisfaction to be *subsequently* ascertained in the method prescribed in the 29th section. The plaintiff contended that the defendants ought to have tendered adequate compensation *before* they did any act. The learned Judge being of opinion with the defendants, nonsuited the plaintiff. Upon motion to set aside the non-

(a) 13 East, 300.

(b) The new way appeared,

by a map, to be about two-thirds nearer than the old way.

suit, the decision at Nisi Prius was confirmed by the Court of K. B. *Per* Lord Ellenborough, C. J. "The convenience of the case, as well as the fair meaning of the words, requires that the satisfaction should be made subsequent and not antecedent to the damage committed: for the mere difference of the weather, whether wet or dry during the continuance of the operation, may make great difference in the amount of the injury done to the land, and in the consequent compensation. Then, as to the sufficiency of the amends, it was not the meaning of the Legislature that it should be settled at Nisi Prius; for the Act says, in terms, that if the parties cannot agree, 'Then such satisfaction and recompence shall be settled and ascertained by order of one or more justice or justices of the peace of the limit where such land or ground shall lie.' The parties, therefore, have no choice of any other tribunal to settle the amends in any case within the Act."

It seems that if, in the above case, the plaintiff had proceeded against the surveyors, for wantonly trespassing over his land, inasmuch as there existed an old road, which was sufficient for the purpose required, he would have succeeded. For Lord Ellenborough said, "If, indeed, the trespass be committed maliciously, and not for the purposes of the Act, it is not a case within it, and the plaintiff would be entitled to recover damages by the verdict of a jury. But that was not the case submitted to the learned Judge at the trial." And *per* Bayley, J. "Where there is a subsisting road, by which the materials may be carried, the surveyors are not wantonly to deviate from that, and to make a new road for the purpose; but where there was not a convenient road before, the Act authorizes the making of a new road."

Assessment may be made, for the purchase of materials.—If sufficient materials cannot be had by any of the ways and means already stated, the 30th section of the Act directs, that an assessment, not exceeding sixpence in the pound, shall be made, for the purpose of obtaining the necessary materials. This enactment will be noticed under the next head of this section, which will detail the provisions with regard to assessments in general.

Pits or holes, made in getting materials, to be filled up or fenced off.—By Section 31, If any surveyor, or person employed by him, shall, by reason of the searching for, digging, or getting any gravel, sand, stones, chalk, clay, or other materials for repairing any highways, make, or cause to be made, any pit or hole in any such lands or grounds, rivers or brooks, as aforesaid, wherein such materials shall be found, such surveyor, person or persons, shall forthwith cause the same to be sufficiently fenced off, and such fence supported and repaired during such time as the said pit or hole shall continue open; and shall within three days after such pit or hole shall be opened or made, where no gravel, stones, or materials shall be found, cause the same to be forthwith filled up, levelled, and covered with the turf or clod which was dug out of the same; and where any such materials shall be found, within fourteen days after having dug up sufficient materials in such pit or hole, cause the same to be filled up, sloped down, or fenced off, and so continued;—and every surveyor shall, within twenty days after he shall be appointed to that office, cause all the said pits and holes, which shall then be open and not likely to be further useful, to be filled up or sloped down in manner aforesaid; and if they are likely to be further useful, he shall secure the same by posts and rails or other fences, to prevent accidents to persons or cattle:—and in case such surveyor,

person or persons, shall neglect to fill up, slope down, or fence off, such pit or hole, in manner and within the time aforesaid, he or they shall forfeit the sum of ten shillings for every such default;—and in case such surveyor, person or persons, shall neglect to fence off such pit or hole, or to slope down the same, as herein before directed, for the space of six days after he or they shall have received notice for either of those purposes from any justice of the peace, or from the owner or occupier of such several ground, river, or brook, or any person having right of common within such comuton or waste lands as aforesaid, and such neglect and notice shall be proved upon oath before one or more of the said justices of the peace, such surveyor, person or persons, shall forfeit and pay any sum, not exceeding ten pounds nor less than forty shillings, for every such neglect, to be determined and adjudged by such justice or justices, and to be laid out and applied in the fencing off, filling up, or sloping down, such pit, or hole, and toward the repair of the roads in the parish, township, or place where the offence shall be committed, in such manner as the said justice or justices shall direct and appoint; which forfeiture, in case the same be not forthwith paid, shall be levied as other forfeitures are hereinafter directed to be levied (a).

Limitation of time when materials are to be dug for in other parishes.—By Section 32, No stone, gravel, or materials, to be dug for the use of any other parish, township, or place, than that wherein the same are found, shall be removed or carried from the place where they shall be so dug at any other time than between the 1st day of April and the 1st day of November, or in the time of hard frost in the winter season.

(a) By s. 72.—See post, Chapter VI.

Penalty for damaging bridges, mills, buildings, &c.— By sect. 33, If any person shall dig, or cause to be dug, materials for the highways, contrary to the direction of this Act, whereby any bridge, mill, building, dam, highway, ford, mines, or tin works may be damaged or endangered, every offender therein shall forfeit, for every such offence, any sum not exceeding five pounds, nor less than twenty shillings, at the discretion of the court or justices before whom complaint thereof shall be made.

*Surveyor may contract for the getting and carrying of materials.—*And by Sect. 49, It is enacted, That in every parish, township, or place, where a sufficient quantity of stone, gravel, chalk, or other materials, cannot be provided and carried by the labourers and teams required by this Act to perform statute duty within such parish, township, or place, the said surveyor shall and is hereby required to contract for the getting and carrying thereof, (in the presence of the said assistant, if any such shall be appointed), at a meeting to be held for that purpose, of which ten days notice in writing shall be given, by fixing the same upon the door of the church or chapel of such parish, township, or place, or if there be no church or chapel, at the most public place there; which notice shall specify the work to be done, and the time and place for letting thereof.

*Penalty upon surveyor's having a share in any contract, or in the sale of any materials.—*And by the same Section, if any surveyor shall have any part, share, or interest, directly or indirectly, in any such contract, or in any other contract or bargain for work or materials, to be made, done, or provided, upon, for, or on account of any of the highways, roads, bridges, or other works what-

soever, under his care or management;—or shall, upon his own account, directly or indirectly, let to hire any team, or sell or dispose of any timber, stone, or other materials, to be used or employed in making or repairing such roads, bridges, or other works as aforesaid, (unless a licence in writing for the sale of any such materials, or to let to hire any such team, be first obtained from some justice of the peace within that limit;) he shall forfeit for every such offence the sum of £10, and be for ever after incapable of being employed as a surveyor, with a salary, under the authority of this Act.

IV. The imposition of assessments, where the statute duty and composition are insufficient.

Power to levy assessment for the purchase of materials.—By Stat. 13 Geo. 3. c. 78. s. 30, After reciting, that in some parishes, townships, or places, there may not be sufficient materials for the repair of the highways within the same, nor within the waste lands, common grounds, rivers, or brooks of any other parish, township, or place, lying within a convenient distance from such highway, by reason whereof the surveyor of such highway may be forced to buy such materials, and to make recompence and satisfaction to the owner or occupier of inclosed lands for damage which may be done by getting and carrying thereof; and that no provision is made for raising a fund to reimburse the expences thereof, and also such expences as the said surveyors may incur by erecting guide-posts, or other posts or stones, and by making or repairing such trunks, tunnels, plats, bridges, or arches, as aforesaid, and by rendering satisfaction for damages done to lands by the making of new ditches or drains, nor for the salary to be paid by such parish, township, or place, to such surveyor as aforesaid:—It is

enacted, that upon application by such surveyor to the justices of the peace, at their Special Sessions, and oath made of the sum or sums of money which he hath *bond fide* laid out and expended, or which will be required for the purposes aforesaid, the said justices, or any two or more of them, shall, and they are hereby empowered, by warrant (a) under their hands and seals, to cause an equal assessment to be made for the purposes aforesaid upon all occupiers of lands, tenements, woods, tithes and hereditaments, within such parish, township, or place, where such money shall be so expended or laid out;—and the same shall be made and collected by such person or persons, and allowed in such manner, as the said justices by their order at such Sessions, shall direct and appoint in that behalf;—and the money thereby raised shall be employed and accounted for, according to the direction of the said justices for the purposes aforesaid; and the said assessment shall be levied in such manner as hereinafter mentioned:—Provided nevertheless, that no assessment to be made for those or any of those purposes, in any one year, shall exceed the rate of sixpence in the pound of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so to be assessed.

Power to levy assessment, for the purpose of repair in general.—By *Stat.* 13 Geo. 3. c. 78. s. 45, If upon application of the surveyor of the highways for any parish, township, or place, to the justices of the peace for the limit wherein such parish, township, or place lieth, at their General or Quarter Sessions of the peace, or at

(a) See Form, Appendix, No. XXV.

some Special Sessions for the highways, the said justices shall be fully satisfied, by proof upon oath, that the duty hereby directed to be performed, and the money hereby authorized to be collected and received, has been performed, applied, and expended, according to the directions of this Act; or shall be fully satisfied that the common highways, bridges, causeways, streets, or pavements, belonging to such parish, township, or place, are so far out of order that they cannot be sufficiently amended and repaired, paved, cleansed, and supported, by the means hereinbefore prescribed, (notice being first given (a) of such intended application, at the church or chapel of such parish, township, or place, on some Sunday preceding such Quarter or Special Sessions; or if the place be extra-parochial, notice in writing being first given of such intended application to some of the principal inhabitants residing in such extra-parochial place, a week at least before such General or Special Sessions): then and in any of the said cases, an equal assessment upon all and every the occupier of lands, tenements, woods, tithes, and hereditaments, within any such parish, township, or place, shall or may be made or collected by such person and persons, and allowed in such manner as the said justices by their order (b), at such General or Special Sessions, shall direct and appoint in that behalf;—and the money thereby raised shall be employed and accounted for, according to the orders and directions of the said justices, for and towards the amending, repairing, paving, cleansing, and supporting such highways, causeways, streets, pavements, and bridges, from time to time, as need shall require.

(a) See Form, Appendix, No. XXVI.

(b) See Form, Appendix, No. XXV.

Limitation to amount of assessment.—But by *Sect. 46*, It is provided, that the assessment herein last before authorized, and the assessment hereinbefore authorized (*a*), for buying materials, making satisfaction for damages, erecting guide-posts, and paying the surveyor's salary, shall not together in any one year exceed the rate of nine pence in the pound of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so to be assessed.

Before these enactments were made, it was decided, in the case of *Rex v. The Inhabitants of Stroud* (*b*), that an order for imposing a rate towards the repairs of the highways was void, 1st, Because it did not appear but that the statute labour was sufficient, and 2dly, Because only the occupiers of land were charged, whereas others were equally liable.

Occupier of tithes.—Upon the above clauses, and also upon the *Stat. 43 Eliz. c. 2.* (for the relief of the poor) several cases have been decided, as to the question, whether a transmutation of tithes, (as for example, where under an Inclosure Act a corn-rent is allotted in lieu of tithes,) alters the nature of the income received by the parson, so far as to relieve him from all liability to be assessed to the highway or poor rates.

The words of *43 Eliz. c. 2.* are somewhat different from those used in the above enactments. The assessment there is directed to be made upon "every inhabitant, parson, and vicar, and every other occupier of lands, houses, tithes impropriate, appropriations of tithes, coal mines, or

(*a*) By s. 39. vide ante, p. 160.

(*b*) 1 Stra. 315.

saleable underwoods." But the effect seems to be the same in both Acts, as to the specific subject of tithes. Although in the Poor Act, a parson and vicar are rateable *eo nomine*, yet as to their tithes, they are liable in respect of the occupation thereof, which seems to assimilate their situation under this and under the Highway Act. This appears at least to be the better opinion.

In the case of *Rex v. The Justices of Buckinghamshire* (a), the Court of K. B. admitted that it was a doubtful point, whether a parson, who lets his tithes from year to year to the occupiers of the lands respectively whereon they are produced, is liable to be rated to the repair of the highways: and, therefore, they refused to issue a *mandamus*, commanding the justices to grant a warrant of distress for enforcing payment of such an assessment; as it might possibly render the justices liable to an action.

Later decisions, however, seem to have dispelled this doubt; although the exact question which arose in the above case has not come before the Court. By these it appears to be settled, that what is substituted for tithes is liable to the same burthens, as would be chargeable upon the tithes themselves.

In the case of *Rex v. Boldero* (b), an Inclosure Act directed that the Commissioners should ascertain the annual value of all the lands and grounds liable to the payment of tithes, and also what yearly sum would, according to that valuation, be equivalent to one-fifth part of the arable lands, &c. And the Commissioners were to ascer-

(a) 1 B. & C. 485.

(b) 4 B. & C. 467. — See the

case of *Lowndes v. Horne*, 2 W. Black. 1252. to the same effect.

tain the proportions of that yearly sum to be charged upon the several estates, as a *yearly rent*, and payable thereout respectively to the rector and his successors, in lieu of the tithes thereof. And after the commencement of the said yearly rents, the tithes, &c. were to be extinguished. *The Court of K. B.* held, that the rector was liable to be rated to the poor in respect of this rent or annual payment. *Per Bayley, J.* "It appears to me, that in the present case, the money-payment is liable to the same burthens, as the tithes for which it was substituted. It is, indeed, called a rent, but in fact, is nothing more than a sum of money paid annually in lieu of tithes (a), and is not to have all the attributes of a rent, although the Act gives the same mode of recovering it." *Per Holroyd, J.* "It is clear, as a general proposition, that not only tithes but also compensations in lieu of them are rateable."

The above decision has been expressly followed, in the instance of highways, in the case of *Rex v. Lacy* (b). By the Inclosure Act, the Commissioners were "to affix a fair clear annual rent or sum of money *per acre* in lieu of the great tithes and moduses, and as an adequate compensation and satisfaction for the same." The Court held, that the rector was, in respect of such rents, rateable to the repair of the highways. *Per Cur.* Since the case of *Rex v. Boldero*, it must be considered as settled, that the corn-rents would stand upon the footing of the tithes and moduses for which they were substituted.

In the last case, the Inclosure Act directed the rents to be estimated according to the *net value* of tithes and

(a) This seems to be a direct answer to the doubt expressed in

Rex v. The Justices of Bucks, sup.
(b) 5 B. & C. 702.

moduses, and it was insisted, that by *net value* was to be understood the value *free from rates*. But the Court thought otherwise.

Where, however, the Act, which directs that a yearly sum shall be paid in lieu of tithes, provides for the payment thereof "free and clear of all rates, taxes, and deductions whatsoever," or "free from all taxes and deductions whatsoever" (omitting the word "rates"); in such a case the parson will not be rateable in respect of such yearly sum, either to the relief of the poor, or to the repair of the highways (a).

Power to levy an additional assessment.—By *Statute* 54 Geo. 3. c. 109. s. 1, After reciting, that by 13 Geo. 3. c. 78, the justices of the peace, at their General Quarter or Special Sessions for the highways, are empowered to allow certain assessments to be made and collected for the maintenance and repair of the highways: and that it had been found by experience, that the assessments, which are authorized by that Act, are not sufficient for the purposes to which the same are therein directed to be applied: It is therefore enacted, That if upon the application of the surveyor of the highways of any parish, township, or place, to the justices of the peace at their General or Quarter Sessions, or at a Special Sessions for the highways, the said justices shall be fully satisfied that the common highways, bridges, causeways, streets, or pavements, belonging to such parish, township, or place, are so far out of order, that they cannot be sufficiently amended and supported by the means in the said therein

(a) *Chatfield v. Ruston*, 3 B. 6 B. & C. 274.—And see *Rex v. & C. 863*.—*Mitchell v. Fordham*, Toms, Doug. 401.

before recited Act (a) prescribed, and by the assessments therein authorized to be made and collected, it shall be lawful for the said justices to authorize, order, and direct an additional assessment to be made on such parish, township, or place (over and above all the assessments by the said Act authorized to be made and collected);—which said additional assessment shall be levied and collected by the same means, and in the same manner and form, as is directed for the levying and collecting the assessments made under the authority of the said therein before recited Act, and upon the same persons as are therein declared to be liable to be rated to the said assessments.

Notice to be given before any additional assessment be applied for.—By Section 2, It is provided, That notice (b) of such intended application shall be first proved before the said justices, upon the oath of the surveyor making such application, to have been given at the church or chapel, on two Sundays preceding such General or Quarter Sessions, or Special Sessions for the highways; or in townships or places where there are no churches or chapels, to have been stuck up, in writing, in two or more conspicuous places within the said townships or places, for one week at least previous to such General or Quarter Sessions, or Special Sessions for the highways; or in extra-parochial places, to have been given in writing to some of the principal inhabitants residing in such extra-parochial place, a week at least before such General or Quarter Sessions, or Special Sessions for the highways; in order that any person, liable to be rated to the assessment intended to be applied for, may attend at such General or Quarter Sessions, or Special Sessions, if he shall

(a) 13 Geo. 3. c. 78.

(b) See Form, Appendix, No. XXVI.

think fit, there to state to the said justices any objections which he may have to the making and collecting of such assessment.

Limitation to the amount of the assessment.—By *Section 3*, It is provided, That the assessment herein authorized shall not exceed the rate of one shilling and nine pence in the pound, on the actual value at the time of making such additional assessment.

Assessment for the widening of roads.—By *Statute 13 Geo. 3. c. 78. s. 16. (a)*, An assessment, not exceeding sixpence in the pound, is authorized to be levied for the particular purpose of widening or diverting roads, when the surveyor shall not otherwise have money sufficient to effect such alteration.

Mode of enforcing payment of the sums assessed.—By *Section 67*, of the same Act, If any person shall refuse or neglect to pay the sum or sums assessed upon him by any assessment made in pursuance of this Act, within ten days after demand thereof made, the same shall and may be levied by the surveyor or any other person or persons authorized, by warrant *(b)* under the hand and seal of one justice of the peace having jurisdiction therein, by distress and sale of the goods and chattels of the person so refusing or neglecting, rendering the overplus to the owner or owners thereof, the necessary charges of making such distress and sale being first deducted;—And in default of such distress *(c)*, it shall be lawful for any such justice to commit *(d)* the person so refusing or ne-

(a) Vide post, Chapter V. s. 2.

(b) See Form of Summons and Warrant, Appendix, Nos. XXVII. XXVIII.

(c) See Form of Return, Appendix, No. LXI.

(d) See Form of Commitment, Appendix, No. LXII.

glecting to the common gaol, there to remain until he shall have paid the sum so assessed, and the costs and charges occasioned by such neglect or refusal.

Indigent persons exempted from payment.—By Section 5, of stat. 34 Geo. 3. c. 74. before noticed (*a*), the justices are empowered to exempt poor persons from the payment of all rates, assessments, or composition whatsoever.

V. Certain miscellaneous regulations, as to repair in general; and as to the execution of the several Acts.

1st. As to Repair in general.

As to the width of highways.—By Statute 13 Geo. 3. c. 78. s. 15, The surveyors of the highways are required to make, support, and maintain, every public cart-way leading to any market-town, twenty feet wide at the least; and every public horse-way or drift-way, eight feet wide at the least; if the ground between the fences inclosing the same will admit thereof.

Justices may order what highways shall be first repaired.—By Stat. 13 Geo. 3. c. 78. s. 25, The said justices of the peace, at any Special Sessions to be held by virtue of this Act, may, by writing (*b*) under their hands and seals, order and appoint those highways (not being turnpike road) which in their opinion do most want repair within their jurisdiction, to be first amended, and at what time and in what manner the same shall be amended; according to which order, if such there be, all and singular the respective surveyors of the said highways are hereby required to proceed within their respective liberties.

(*a*) See ante, p. 147.

(*b*) See Form, Appendix, No. XXIX.

Justices may order highways, liable to be repaired by tenure, to be repaired.—By Stat. 13 Geo. 3. c. 78. s. 23, Every surveyor shall and may, from time to time, give information (a) upon oath to the said justices, or any two or more of them, of all such highways, and of all bridges, causeways, or pavements, upon such highways, as are out of repair, and ought to be repaired by any person or persons, bodies politic or corporate, by reason of any grant, tenure, limitation, or appointment, of any charitable gift, or otherwise howsoever; and the said justices shall limit a time for repairing the same, of which notice shall be given by the said surveyor to the occupier or occupiers of the lands or tenements liable to the burthen of such repairs, or to such other person or persons, bodies politic or corporate, as are chargeable with the same;—And if such repairs shall not be effectually made within the time so limited, the said justices shall and are hereby required to present such highways, bridges, causeways, or pavements, so out of repair, together with the person or persons, bodies politic or corporate, liable to repair the same, at the next General Quarter Sessions of the peace for the limit wherein such highways shall lie; and the justices at such Quarter Sessions may, if they see just cause, direct the prosecution to be carried on at the general expence of such limit, and to be paid out of the general rates within the same.

Persons enfeoffed with lands for repair, &c. shall let them at their most improved value.—By Stat. 13 Geo. 3. c. 78. s. 51, Where any lands have been or shall be given for the maintenance of causeways, or pavements, highways, and bridges, all such persons who are or shall be enfeoffed or trusted with any such lands, shall let them

(a) See Form, Appendix, No. XXX.

to farm at the most improved yearly value without fine:— And the justices of the peace, in their open Sessions, shall and may inquire, by such ways and means as they shall think fitting, into the value of all such lands so given or to be given, and order the improvement and employment of the rents and profits thereof according to the will and direction of the donors of such lands, if they find that the persons so entrusted have been negligent or faulty in the performance of their trust, (except such lands have been given for the uses aforesaid to any college or hall in either of the universities of this kingdom which have visitors of their own), any law, statute, usage, or custom, to the contrary notwithstanding.

As to the application of penalties, &c.—By Statute 13 Geo. 3. c. 78. s. 72, All penalties and forfeitures, when levied as therein directed, shall be paid, one half to the informer, and the other half to the surveyor of the highway where the offence, &c. shall happen, to be applied towards the repair thereof, unless otherwise directed by this Act; but in case the surveyor shall be the informer, then the whole shall be employed towards the repair of such highway (a).

Ditches, drains, &c.—By Stat. 13 Geo. 3. c. 78. s. 8, It is enacted, That ditches, drains, or water-courses, of a sufficient depth and breadth for keeping all the highways dry, and conveying the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, plats or bridges, shall be made and laid, where any cartways, horseways, or footways lead out of the said highways into the lands adjoining thereto, by the occupier of such lands;—and every person who shall occupy any lands, adjoining to or near the highway, through

(a) See further on this point, post, Chapter VI. Sect. 2.

which the water hath used to pass from the said highway, shall open, cleanse, and scour, the ditches, water-courses, or drains, for such water to pass without obstruction;—and every person making default in any of the matters aforesaid, after ten days' notice given by the surveyor, shall forfeit 10s. (a)

By *Section 14*, Where the ditches, gutters, or water-courses, which have been usually made, or which are herein directed to be made, cleansed, and kept open, shall not be sufficient to carry off the water which shall lie upon and annoy the highways; in such case it shall be lawful for the surveyor, by order of one justice (b), to make new ditches and drains (c) in and through the lands adjoining or lying near to such highways, or in and through any other lands, if it shall be necessary, for the more easy and effectual carrying off such water from the said highways, and also to keep such ditches, gutters, or water-courses scoured, cleansed, and opened; and the surveyors and their workmen may go upon the said lands for that purpose:—Provided that the said surveyors make proper trunks, tunnels, plats, bridges, or arches, over such ditches, gutters, or water-courses, where the same shall be necessary, for the convenient use and enjoyment of the lands through which the same shall be made, and from time to time keep the same in repair; and do also make satisfaction to the owner or occupier of such lands, which are not waste, or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in several or inclosed grounds are directed to be settled and paid.

(a) See Form of Warrant, Appendix, No. XXXI.

(b) See Form, No. XXXII.

(c) See *Sutton v. Clarke*, 6 Taunt. 29.—1 Marsh. 429, 8. C.

As to hedges, trees, &c.—By Statute 13 Geo. 3. c. 78. s. 6, No tree, bush, or shrub shall be permitted to stand or grow in any highway, within the distance of fifteen feet from the centre thereof (*a*), (except for ornament or shelter to the house, building, or court-yard of the owner thereof,) or hereafter be planted within the distance aforesaid; but the same shall respectively be cut down, grubbed up, and carried away, by the owner or occupier of the land or soil, within ten days after notice to him or his agent by the surveyor, on pain of forfeiting for every neglect the sum of 10*s*.

In a late case (*b*) it was contended, that from the above clause, aided by the 64th Section, which enacts, That if any person shall encroach, by making a hedge or other fence on any highway within the distance of fifteen feet from the centre, he shall forfeit 40*s*.; it clearly appeared to be the intention of the Legislature, that there should not in any case be either trees or fences within fifteen feet from the centre of the road; and that when the road was less than thirty feet wide, the surveyor was authorized to widen it, by causing the removal of trees and fences, although not growing upon the highway. In this case the surveyor had removed a fence, that stood upon the private soil of the plaintiff, and abutted upon a road which was not, at that part, more than twenty-four feet wide. But the plaintiff recovered in an action of trespass, and the Court of K. B. refused a rule for a nonsuit, or a new trial, observing, "The Highway Act does not say that every highway shall be thirty feet wide. Unless the fence be *on* the highway, the party erecting it is

(*a*) See stat. 3 Geo. 4. c. 126. s. 124. where it is enacted what shall be deemed to be the centre

of a turnpike road.

(*b*) Lowen v. Kaye, 4 Barn. & Cres. 3.

not guilty of any offence against the statute, nor is the surveyor authorized to remove it."

By *Section 7*, of the same Act, The possessors of the land next adjoining to every highway shall cut, prune, or plash their hedges; and also cut down or prune and lop the trees growing in or near such hedges or other fences (except these trees planted for ornament or shelter as aforesaid), in such manner that the highways shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such highway to the damage thereof:—And if such possessor shall not, within ten days after notice (*a*) given by the surveyor for that purpose cut, prune, and plash such hedges, and cut down, or prune and lop such trees, in manner aforesaid, the surveyor may and he is hereby required to complain (*b*) thereof to some justice of the peace of the limit where such highway shall be, who shall summon (*c*) the possessor of the said lands to appear before the justices at some Special Sessions for that limit (*d*), to answer to the said complaint; and if it shall appear to the justices at such Special Sessions, that such possessor had not complied with the requisites of this Act, it shall and may be lawful for the said justices, upon hearing the surveyor and possessor of such land, or his agent, (or in default of appearance, on having due proof of the service of such summons,) and considering the circumstances of the case, to order (*e*) such hedges to be cut, plashed, and pruned, and such trees to be cut down, or pruned, in

(*a*) See Form, Appendix, No. XXXIII.

(*b*) See Form, Appendix, No. XXXIV.

(*c*) See Form, Appendix, No. XXXV.

(*d*) See Forms, Appendix, Nos. XXXVI. XXXVII.

(*e*) See Form, Appendix, No. XXXVIII.

such manner as may best answer the purposes aforesaid. And if the possessor of such lands shall not obey such order within ten days after it shall have been made, and he shall have had due notice thereof, he shall forfeit two shillings for every twenty-four feet in length of such hedges which shall be neglected to be cut and plashed, and two shillings for every tree which shall be neglected to be cut down, or pruned and lopped; and the surveyor shall cause the same to be done, and the possessor shall pay, over and above the penalties, the charges and expences (a) of doing the same; or in default thereof, such charges and expences shall be levied, together with the said forfeitures, upon his goods and chattels, by warrant from a justice of peace (b), in such manner as is authorized for forfeitures incurred by virtue of this Act.

By *Section 13*, It is provided, That no person shall be compelled, nor any surveyor permitted, to cut or prune any hedge at any other time than between the last day of September and the last day of March, and that no person shall be obliged to fell any timber-trees growing in hedges at any time whatsoever, except where the highways shall be ordered to be enlarged as hereinafter mentioned, or to cut down or grub up any oak trees growing within such highway, or in such hedges, except in the months of April, May, or June, or any ash, elm, or other trees, in any other months than December, January, February, or March.

Direction Posts, &c.—By *Statute 13 Geo. 3. c. 78. s. 26*, For the better convenience of travellers, where several highways meet, it is enacted, That the said justices, at some Special Sessions to be held for the purposes of

(a) See Form, Appendix, No. XXXIX.

(b) See Form, Appendix, No. LX.

this Act, shall issue their precept (a) to the surveyor of the highways for any parish, township, or place, where several highways meet, and there is no proper or sufficient direction-post, or stone, already fixed or erected, requiring him forthwith to cause to be erected or fixed in the most convenient place where such ways meet, a stone, or post with inscriptions thereon, in large legible letters, painted on each side thereof, containing the name or names of the next market-town or towns, or other considerable place or places, to which the said highways respectively lead;—and also at the several approaches or entrances to such parts of any highways as are subject to deep or dangerous floods, graduated stones or posts, denoting the depth of water in the deepest part of the same, and likewise such direction-posts, or stones, as the said justices shall judge to be necessary, for the guiding of travellers in the best and safest track through the said floods or waters; and the said surveyor shall be reimbursed the expences of providing and erecting the same respectively out of the monies which shall be received by him or them, pursuant to the directions of this Act;—And in case any surveyor shall, by the space of three months after such precept to him directed and delivered, neglect or refuse to cause such stones or posts to be fixed as aforesaid, every such offender shall forfeit the sum of 20s.

As to the number of draught horses.—By Statute 13 Geo. 3. c. 78. sections 55, 56, 57, and 58, The number of horses, allowed to be attached to waggons, carts, and other carriages, is limited in proportion to the width of the wheels. This, however, is rather matter of annoyance, than relating to repair, and will therefore be noticed in the last Chapter of this treatise.

(a) See Form, Appendix, No. XL.

2dly, As to the execution of the several Acts.

Meetings of inhabitants.—By *Stat.* 13 Geo. 3. c. 78. s. 66, In all cases where a vestry or public meeting of the inhabitants of any parish, township, or place, is authorized or directed by this Act, there shall be public notice given of the day, hour, and place of holding the said meeting, at the church or chapel of such parish, township, or place, on the Sunday next preceding such meeting; and also notice thereof in writing^(a), specifying the purpose of such meeting, fixed at the same time upon the door of such church or chapel, and the same shall not be held till three days at least after such notice given:—and if there be no church or chapel, the like notice of such meeting shall be given in writing, and put up at the most public place therein three days at the least before such meeting.

Justices, &c.—By *Stat.* 13 Geo. 3. c. 78. s. 53, The justices of the peace of all cities, corporations, boroughs, and other places, are hereby required to put in execution every part of this Act within their respective jurisdictions.

By *Statute* 54 Geo. 3. c. 109. s. 8, The justices of the peace, and magistrates of all cities, corporations, boroughs, precincts, liberties, and other separate jurisdictions, are hereby authorized and required to put in execution every part of this Act within their respective jurisdictions, so far as the provisions thereof are appli-

(a) See Form, Appendix, No. XLI.

cable, in as full and ample a manner as the justices of any county or of any division thereof (*a*).

Sessions, &c.—By *Statute* 13 Geo. 3. c. 78. s. 61, It shall be lawful for any two or more justices of the peace within their respective limits, and they are hereby empowered, from time to time whenever they shall judge proper, to hold any Special Sessions, besides that which is herein before directed, for executing the purposes of this Act; and to adjourn the same from time to time, as they shall think fit; causing notice (*b*) to be given of the time and place of holding such Special Sessions, and of the adjournment thereof, to the several justices acting and residing within such limits by the high constable or other proper officer within the same.

By *Statute* 55 Geo. 3. c. 68. s. 6, After reciting, that by an Act passed in the 54th year of his present Majesty, intituled, "An Act to amend an Act of the 13th Year of his present Majesty," it is, among other things, enacted, That two or more justices of the peace, at their Special Sessions to be holden in the week next after Michaelmas, yearly, shall fix such rates as they shall judge reasonable, as a composition in lieu of teams, carts, horses, oxen, or labour; and that certain other matters relative to the highways are directed to be done by justices of the peace, at their Special Sessions to be holden in the week next after the Michaelmas Quarter Sessions, and that the time for holding the Michaelmas Quarter Sessions has been

(*a*) By 13 Geo. 3. c. 78. s. 77, The justices are authorized to administer oaths. And by s. 76, of the same Act, the inhabitants of a parish are allowed to be good witnesses. See post, Chapter VI.

(*b*) As to the notice requisite, see Chapter V. Section II. Part the First, and *Rex v. The Justices of Worcestershire*, 2 B. & A. 228.

altered by an Act made in the 54th year of his present Majesty, intituled, "An Act for regulating the Time of holding the Michaelmas Quarter Sessions," (a), it is enacted, That it shall be lawful for the justices of the peace, assembled in their Special Sessions in the week after Michaelmas, to do and perform every act, which they might heretofore legally have done in the Special Sessions directed to be holden in the week after the said Michaelmas General Quarter Sessions of the peace.

Forms of proceedings. — By Stat. 13 Geo. 3. c. 78. s. 69, The forms of proceedings set forth in the Schedule are directed to be used upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and no objection shall be made or advantage taken for want of form in any such proceedings by any person whomsoever.

Under this clause it has been decided, that a material variance from the form prescribed by the Act is fatal, and may be taken advantage of in a collateral proceeding (b).

Exemptions from the operation of the Act. — By Stat. 13 Geo. 3. c. 78. s. 86, Nothing in this Act is to extend to the parish of Saint Mary Matfelon, otherwise White-chapel, and Saint John of Wapping, in the county of Middlesex, or either of them.

(a) This Act, however, is merely directory; and the Sessions may, notwithstanding, be legally holden at another time. *Rex v. The Justices of Leicester*, 7 B. & C. 6.

(b) *Davison v. Gill*, 1 East, 64.

It may here be noticed, that in the Appendix to this Treatise, those Forms, which are given in the Schedules to the Acts of Parliament, are peculiarly marked as being derived from that source.

And by *Section 87*, The powers of the Commissioners of Sewers are declared not to be altered by this Act.

We have already seen (*a*), that the clauses relative to the appointment of surveyors are not to extend to the city of Bristol.

SECTION II.

The Law of Repair, as it regards Turnpike Roads.

It has been already stated, that it is through the application of a new principle, by which highways are converted into turnpike roads. This innovation upon the old law consists principally of the two following points: The *suspension* of the liability of the parish to the repairs of the road, except by the performance of their statute labour: and the substitution, in lieu of the parish, of a body of trustees or commissioners, who are clothed with a contracting power, are enabled to levy tolls upon all passengers, and are authorized to raise money upon loan.

Under the simple system of the common law, we have seen, that whenever a highway was out of repair, the inhabitants of the parish were bound, by actual labour thereon, to re-instate it in good order. Under the Highways Acts a *ministerial* agent is appointed to superintend the management of highways; actual labour is permitted to be compounded for in money; and a power is given to raise funds by assessment, for effecting those repairs or

(*a*) Ante, page 118.

other improvements to which the common law provision may prove inadequate. While by the Turnpike Acts an additional body are appointed, who are made, as it were, the proprietors of the road, but nevertheless upon trust for the public. They are empowered to bargain and sell, and to enter into stipulations—to raise money by mortgage—and, which is the most important of their privileges, they are authorized to levy a tax, the receipts of which are to be applied to the repair and improvement of the roads, which are placed under their management.

By the last Turnpike Act (*a*), all the powers, authorities, clauses, provisions, penalties, matters, and things contained in the then existing Acts, except such parts thereof respectively as are thereby varied, altered, or repealed, are to extend to this Act; and the same, together with all the powers, authorities, clauses, provisions, penalties, matters, and things contained in this Act, are to extend to every local Turnpike Act, as if the same were repeated and re-enacted in the body of such local Turnpike Act; and the said recited Acts and this Act shall not be recited in any such local Act, except as to such powers, &c. as shall be expressly referred to for the purpose of being altered or repealed.

The above clause has the effect of consolidating the whole of the laws upon this subject into one continuous enactment. They will, therefore, be so treated of in this place. And in the detail of the several provisions contained therein, I shall proceed to consider, 1st, The appointment and qualification of trustees, and the other officers, for the management of turnpike roads;—their

(*a*) See 9 Geo. 4. c. 77. s. 19.

several duties;—and their respective liabilities:—2dly, The procuration of materials for the repair of turnpike roads:—3dly, The regulations as to the repair by statute labour, and by prescription:—4thly, The regulations as to the exaction of toll:—5thly, The imposition of extra tolls for narrow wheels, and for over-weight:—6thly, As to exemption from payment of toll:—7thly, The power to raise money upon mortgage of the tolls:—and 8thly, Certain miscellaneous regulations as to repair in general, and as to the execution of the several Acts.

But before I proceed to detail the various provisions of these Acts, I shall just mention the clauses of exception to their operation, which are therein contained; and also a clause that is explanatory of the meaning of certain words, which the Legislature has adopted.

By *Stat. 9 Geo. 4. c. 77. s. 20*, It is declared, That this or the former Acts are not to extend to the *Commercial Road*, which is regulated by *Stat. 9 Geo. 4. c. 112*; nor to affect the *Stat. 56 Geo. 3. c. 83*, or the three several Acts amending the same, for regulating the road from *Glasgow to Carlisle*.

By *Stat. 4 Geo. 4. c. 95. s. 90*, Nothing in *Stat. 3 Geo. 4. c. 126*, or this Act, shall extend to any road not under the care and management of trustees, or to any road which shall be made, maintained, or supported under the provisions of any Act or Acts, passed for an unlimited period, notwithstanding tolls may be collected on such roads; or shall extend to, affect, alter, or interfere with the qualifications of any commissioners or other persons having the care and management of any such last-mentioned roads, or with any tolls taken, or weights carried thereon, or in any other manner therewith.

And by *Section 91*, Nothing in 3 Geo. 4. c. 126, or this Act, shall extend to *Stat. 59 Geo. 3. c. 30*, for regulating the road from *Shrewsbury to Bangor Ferry*; nor to *Stat. 59 Geo. 3. c. 48*, for regulating the roads between *London and Holyhead by Chester*, and between *London and Bangor by Shrewsbury, &c.* and from *Bangor Ferry to Holyhead*.

By *Section 93*, So much of the turnpike road from *Carlisle to Glasgow* as lies in the county of *Cumberland* shall be subject to the regulations, &c. of 3 Geo. 4. c. 126, and of this Act, so far as the same respects nuisances, annoyances, and trespasses; and the justices for the county of *Cumberland* are empowered to enforce all penalties for nuisances, annoyances, and trespasses within that county.

Explanation of words.—By *Stat. 7 & 8 Geo. 4. c. 24, s. 19*, The word *trustees*, in the recited Acts or this Act, shall be construed to extend to all trustees or commissioners, appointed for the execution of any Act for making, amending, repairing, maintaining, or keeping in repair any turnpike road. And the word *person* shall be construed to extend to and to include any one or more person or persons, and of either sex. And the word *county* shall be construed to extend to and to include riding or division. And the word *parish* shall be construed to extend to and to include ward, district, hamlet, township, or place.

Under the sanction of this clause, the above words will be left to stand alone in this treatise, although, in the former Acts, they are always accompanied with some, if not all of the other corresponding expressions.

tion required by the said Act of the 13 Geo. 3. c. 84, or by the Act or Acts in the execution of which such trustee shall have acted, every such trustee shall therefrom become disqualified and be incapable of any longer acting as a trustee;—And if any such trustee, so becoming disqualified, shall presume to act in execution of the Act or Acts under which he previously acted, he shall, for every such offence, incur and be liable to the penalties and forfeitures, imposed by the said recited Act of the third year aforesaid (a) on persons acting as trustees not being duly qualified, to be sued for and recovered under the powers and provisions of the said Act.

Justices of the peace for the county to be trustees ex officio.—By Stat. 3 Geo. 4. c. 126. s. 61, It is enacted, That all his Majesty's justices of the peace, for the time being, acting for the county or counties, through which any turnpike road now does or hereafter shall pass, shall be added to and joined with the trustees for making, repairing, or maintaining every such turnpike road, and shall, on qualifying themselves as hereafter mentioned, have all the same powers and authorities, to all intents and purposes, as if the said justices had severally been named or elected trustees, in or under any Act or Acts of Parliament under which such roads shall be made, repaired, or maintained.

Justices not to take oath of qualification.—But by Stat. 4 Geo. 4. c. 95. s. 34, Nothing in Stat. 3 Geo. 4. c. 126, or in this or any other Act contained shall extend, or be construed to extend, so as to require any justice of the peace acting for any county, to take or subscribe any oath of qualification, before he shall act as trustee

(a) 3 Geo. 4. c. 126. s. 64. See post, p. 190.

in the execution of any Act or Acts for making, repairing, or maintaining any turnpike road.

Justices for smaller divisions than counties to be trustees.—By Stat. 5 Geo. 4. c. 69, After reciting that it is expedient that his Majesty's justices of the peace acting for any riding, division or soke, should also be enabled to act as trustees for the repair of turnpike roads: It is enacted, that from and after the passing of this Act, (17th June, 1824,) all his Majesty's justices of the peace for the time being, acting for the county or counties, riding or ridings, division or divisions, soke or sokes, through any part of which any turnpike road now does or hereafter shall pass, shall have such and the like powers and authorities for the making and repairing any such turnpike road, and be subject to the same rules and regulations, by virtue of or under the said recited Acts (a), as any of his Majesty's justices of the peace acting for any county or counties (b).

Oath to be taken by trustees.—By Stat. 4 Geo. 4. c. 95. s. 32, It is directed, that every trustee shall, before he shall act as such, (except in administering the oath) take and subscribe before one or more of the said trustees (who are empowered to administer the same) the oath following; (that is to say,)

I, A. B. do swear [or, being one of the people called Quakers, do solemnly affirm,] that I will truly and impartially, according to the best of my judgment, execute

(a) 3 Geo. 4. c. 126 — and
4 Geo. 4. c. 95.

(b) See 3 Geo. 4. c. 126. s. 64,
post, p. 189. That any trustee,

in the commission of the peace,
may act as a justice in the execution of the Act, under which he is appointed a trustee.

and perform the several powers, authorities, and trusts, reposed in me as a trustee [or, commissioner] by virtue of an Act passed in the third year of the reign of his Majesty King George the Fourth, intituled, "An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England;" and also an Act passed in the fourth year of the reign of his said Majesty, intituled, [here set forth the title of this Act (a);] and also an Act passed in the year of the reign of his Majesty , intituled, [here set forth the title of the Act under which such trustee or commissioner shall claim to act.] So help me God.

[or, being a Quaker, omit the words "*So help me God.*"]

And if any such person shall act (except as aforesaid) before he shall have taken and subscribed the said oath or affirmation, every such person shall, for every such offence, forfeit the sum of £50 with full costs of suit, to any person who shall inform or sue for the same, in any of his Majesty's Courts of Record at Westminster, by action of debt, &c.:—Provided always, that no act or proceeding, which shall be done or performed by any such person who shall have omitted or neglected to take and subscribe the said oath or affirmation by this Act prescribed, shall be hereby impeached or rendered nugatory: but all such proceedings shall be as valid and effectual, as if such person had taken such oath or affirmation previously to his having acted as such trustee as aforesaid.

(a) "An Act to explain and amend an Act, passed in the third year of the reign of his present Majesty, to amend the general

laws now in being for regulating turnpike roads in that part of Great Britain called England."

By *Section 33*, Quakers are allowed to take an affirmation instead of an oath, whenever it shall be required.

Trustees not to act where interested, &c.—By *Stat. 3 Geo. 4. c. 126. s. 64*, No trustee in or by virtue of any Act for repairing turnpike roads, shall be capable of acting as such in the execution of any such Act, in any case where he shall be personally interested, (except as hereinafter provided,) nor during the time he shall keep a victualling house, or other house of public entertainment, or who shall sell wine, cider, beer, ale, spirituous or other strong liquors by retail, or who shall be a lessee or farmer of the tolls on any turnpike road, or of any part or parts thereof:—Provided that no act or proceeding touching the execution of any such Act, which shall be done or performed by any such unqualified or disqualified person, previously to his being convicted of the offence before mentioned, shall be thereby impeached or rendered nugatory, but all such proceedings shall be as valid and effectual as if such person had been duly qualified:—Provided, that no mortgagee, or assignee of any mortgage or other security, or any lender of money upon the credit of the tolls, or receiving interest thereout for the same, shall on that account only be deemed unqualified to act as a trustee in the execution of any such Act;—And any trustees appointed or to be appointed under any such Act, who are or shall be in the commission of the peace, may act as such justices of the peace, in the execution of any such Act, notwithstanding their being such trustees, except in such cases only wherein they shall be personally interested otherwise than as a trustee, commissioner, mortgagee, assignee, lender of money, or holder of any security on the credit of the tolls granted by any such Act.

By Stat. 7 & 8 Geo. 4. c. 24. s. 1, After reciting that by the last-mentioned Act it is provided, that no person appointed as trustee, in or by virtue of any Act for repairing turnpike roads, shall be capable of acting as such in the execution of any such Act, in any case where he shall be personally interested; and that doubts had arisen with regard to such person's liability; It is therefore enacted, That no trustee of any turnpike road shall be deemed or taken to be personally interested, by reason of his having acted as a trustee in ordering the making, altering, or diverting any turnpike road over or contiguous to any lands, tenements, or hereditaments in his possession or occupancy, or by reason of his having received any sum or sums of money out of the tolls of any such road as or by way of purchase-money, damages, rent, recompence, or satisfaction, agreed upon or awarded to such trustee for any lands, tenements, or hereditaments, or any timber or wood, or materials, purchased or taken for the purpose of making, diverting, or altering, or for the use of the road for which he shall act as a trustee, or for a repository for materials to be used thereon, or for the damage done to any inclosed or private lands or grounds of any such trustee in taking materials therefrom, or in carrying or conveying them over the same.

Penalty upon trustees acting, who are not possessed of the qualification, or are otherwise disqualified.—By Stat. 3 Geo. 4. c. 126. s. 64, If any person not being qualified as aforesaid, or being disqualified by any of the causes aforesaid, or not having taken and subscribed the oath hereinbefore mentioned, or being a Quaker, not having made and subscribed the affirmation hereinbefore mentioned, shall nevertheless presume to act as a trustee in the execution of any such Act, every such person shall, for every such offence, forfeit the sum of £50 to any

person who shall sue for the same, to be recovered with full costs of suit, in any of his Majesty's Courts of Record at Westminster, by action of debt or on the case, or by bill, plaint, suit, or information, wherein no essoin, protection, wager of law, or more than one imparlance shall be allowed; and the person so sued or prosecuted shall prove that he is qualified, and not disqualified as aforesaid, or otherwise shall pay the said penalty without any other proof or evidence on the part of the prosecutor, than that such person had acted as a trustee in the execution of any Act for repairing turnpike roads.

Trustees not to have any interest in any office, contract, &c. under penalty of £100.—By Stat. 3 Geo. 4. c. 126. s. 65, No trustee of any turnpike road shall, from and after this Act shall be in force, enjoy any office or place of profit under any Act, in execution of which he shall have been appointed or shall act as trustee, or have any share or interest in, or be in any manner, directly or indirectly, concerned in any contract or bargain, for making, or repairing, or in any way relating to the road for which he shall act, or for building or repairing any toll-house, toll-gate, or weighing engine thereon, or for supplying any materials for the use thereof; nor shall any such trustee let out for hire any waggon, wain, cart, or other carriage, or any horse, cattle, or team, for the use of any turnpike road for which he shall act as a trustee; nor by himself, or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee of such road:—And if any person after having been appointed or elected a trustee of any turnpike road, shall, without having first duly resigned such office at some meeting of the trustees of the road for

which he shall have been elected or appointed, hold any such office or place, or be concerned in any such contract or bargain, or shall sell any such tools or implements, or let out for hire any waggon, wain, cart, or carriage, horse, cattle, or team, or receive any money out of the tolls as aforesaid, every trustee so offending shall, for every such offence, forfeit the sum of £100 to any person who shall sue for the same, and shall, from and after the conviction of any such offence, be incapable of acting as a trustee of any turnpike road;—And all acts, orders, matters, and things, made or done as a trustee by the party so convicted, shall from thenceforth be null and void, to all intents and purposes; and all and every such contract and bargain shall be and the same is hereby declared to be void, and shall not be enforced against, or carried into effect by the other trustees entering into the same:—Provided that all acts, orders, matters, and things, made or done by such trustee previously to his being convicted of any such offence, shall be good, valid and effectual:—And nothing in this enactment contained shall extend, or be deemed or construed to extend, to any trustee who shall receive any sum or sums of money, paid out of the tolls of any turnpike road, as or by way of purchase-money, damages, rent, recompence, or satisfaction agreed upon or awarded to such trustee, for any lands, grounds, tenements, or hereditaments, purchased or taken for the purpose of diverting or altering, or for the use of the turnpike road for which he shall act as a trustee, or for a repository for materials to be used thereon, or for the damage done to any inclosed or private grounds of any such trustee in taking materials therefrom, or in carrying or conveying them over the same; or to prevent any such trustee from selling or disposing of, for the use of the turnpike road, any materials, or any timber grown or growing on the land or grounds of such trustee.

In a late action of Debt for penalties under the above clause (a), it appeared in evidence, that the defendant was one of the commissioners of a certain turnpike road, and had acted as such, and ordered the surveyor upon different occasions where to put stones upon the road; and that, it being determined by the commissioners to improve a certain portion of the said road, they caused a meeting of commissioners, for the purpose of letting the same by tender, to be advertised; that such meeting was accordingly holden, at which the defendant attended with other commissioners, and acted with them, when a contract for making the intended improvement was entered into with one *Hodgkinson*, who agreed to perform the same according to a plan and specification for the gross sum of £119. *Hodgkinson* commenced his work, at first with men only, but afterwards applied to the defendant to let him his horses and carts. The defendant agreed to let them at the rate of 5s. a-day for a horse and cart, and accordingly furnished three horses and three carts for about a week, and afterwards a greater number, and they were used in hauling earth and stones on the part of the road in question so agreed to be improved. *Hodgkinson* told him what it was for, and saw the defendant there whilst the horses and carts were so used. He paid the defendant for the letting of each horse and cart, by an order on the treasurer of the trustees, but without any reference to his, *Hodgkinson's*, contract with the trustees; and the whole was so paid by *Hodgkinson*, previously to the payment of his own demand, by the trustees, according to the contract. *Hodgkinson* went to the

(a) *Towsey v. White*, 5 B. & C. 125. Several questions of this nature have occurred under the

poor laws. See *West v. Andrews*, 5 B. & A. 328, and the cases there cited.

defendant and asked him for his horses and carts; the defendant did not go to him. And *Hodgkinson* hired horses and carts of other persons, and he paid all alike. Upon these facts, the Court of King's Bench held that the defendant had, by his conduct, subjected himself to the penalties contained in the Act. And Bayley, J. said, "I have no doubt whatever. This is a case clearly within the spirit of the Act. The great object of the Legislature was to prevent any bargaining between the trustees and the contractors, so as to give the former an interest adverse to their duty."

Not to extend to proprietors in any canal or railway company.—But by *Stat. 4 Geo. 4. c. 95. s. 37*, It is enacted, That no person, being a trustee of any turnpike road, shall be liable to the said penalty of £100, or any other penalty or forfeiture, for or by reason of his being only a proprietor or holder of any share in any canal or railway company, which shall contract with the trustees of the road for which such person shall act as a trustee for the carriage or conveyance of any materials for the repair of such road.

Appointment of new trustees.—By *Stat. 3 Geo. 4. c. 126. s. 66*, When any of the trustees, save and except the justices of the peace, appointed or to be elected and appointed under any Act of Parliament for making, repairing, or maintaining any turnpike road, shall die, or by bankruptcy, insolvency, or otherwise, become disqualified to act, or by writing under their hands refuse to act in the execution of such Act, it shall be lawful for the surviving or remaining trustees from time to time to elect and appoint one other fit person, qualified as aforesaid, to be a trustee in the room of every trustee dying, or becoming

disqualified, or refusing to act as aforesaid:—Provided that notice of the time and place of meeting of the trustees for every such election be given by the clerk or clerks to such trustees, by affixing the same in writing upon all the toll-gates or turnpikes erected upon the said road, for which they shall act as trustees, and by inserting such notice in one or more of the newspapers circulating in that part of the country where such roads shall pass, fourteen days at least before every such meeting:—And every person who shall be elected and appointed a trustee, pursuant to the directions of this Act, shall and may act with the surviving and remaining trustees in the execution of such Act, to all intents and purposes as if he had been therein named and appointed a trustee.

As to the annual meeting of trustees.—By Stat. 3 Geo. 4. c. 126. s. 69, All trustees of every turnpike road or roads shall, and they are hereby required to hold a general meeting of the trust for which they shall respectively act, on a day to be by them, or any three or more of them, appointed in the months of April, September, or October; of which meeting twenty-one days' notice shall be given, by inserting the same in some newspaper or newspapers usually circulating in the county or counties in which the road or roads, in respect whereof such meeting shall be held, lie or are situated; which said meeting shall be called or known as "*The General Annual Meeting of the Trustees*;" and at such meeting the trustees assembled shall elect a chairman for the purposes thereof, and shall also audit their accounts, and report the state of the road or roads under their care and superintendence.

By Section 70, Where a sufficient number of the trustees of any turnpike road shall not meet on the day ap-

pointed by any such Act or Acts for their first meeting, or shall not meet on the day appointed by adjournment for their meeting, or for want of a proper adjournment, by which means, or by some or one of them, the intent of the said Act or Acts may be frustrated; in all or either of the said cases, it shall be lawful for so many of the said trustees as shall meet, or the major part of them, or in case no such trustee shall be present, for their clerk or clerks, to cause notice in writing to be affixed on all the turnpike gates which shall be then erected on the said respective roads, or if no turnpike gate shall then be erected, to cause the like notice to be affixed in the most conspicuous place in one of the principal towns or places nearest to which the roads directed to be repaired do lie, and also in some public newspaper circulated in the county in which the road shall be situate, at least ten days before the intended meeting, appointing such trustees to meet at such place where the preceding meeting was appointed to have been held, or at the place directed for the first meeting of such trustees, if no such preceding meeting shall have been held:—And the said trustees, when met in pursuance of such notice shall, and they are hereby required to proceed and carry such Act or Acts into execution, in the same and in as ample and full a manner to all intents and purposes, as they might or could have done if no such neglect had happened.

By *Stat. 4 Geo. 4. c. 35*, After reciting that it has happened, that the trustees appointed to carry into execution any Act or Acts of Parliament have not been able to meet on the day appointed by such Act or Acts for carrying the same into execution, by reason that the day appointed for such meeting has been antecedent to the passing of such Act or Acts, whereby the intent of such Act or Acts

hath been or may be frustrated :—For remedy thereof, it is enacted, that in all cases where the trustees appointed by any Act or Acts of Parliament have not been or shall not be able to meet on the day appointed for their first meeting by any such Act or Acts, by reason that the day appointed for such meeting has been or shall be antecedent to the passing of such Act or Acts, it shall be lawful for three or more of the said trustees, appointed to execute such Act or Acts, to meet at the place appointed by such Act or Acts for the first meeting of such trustees on the fourteenth day after the passing of such Act or Acts, or of this Act; and every such meeting shall be as good, valid and effectual, as if such trustees had met in pursuance of the Act or Acts of Parliament which they are appointed to carry into execution,

By *Stat. 4 Geo. 4. c. 95. s. 42*, After reciting, that by *Stat. 3 Geo. 4. c. 126*, All trustees of every turnpike road or roads are required to hold a general meeting of the trust for which they shall respectively act, on a day to be by them, or any three or more of them, appointed in the months of *April, September and October*;—It is enacted, That where, in and by any Act of Parliament, a general annual meeting of the trustees, acting in execution of such Act, shall be appointed to be held at any other time of the year than in the said months of *April, September, or October*, and the said trustees shall have held such meetings under the authority of such Act, it shall be lawful for such trustees to continue to hold the said general annual meetings at the time mentioned and directed in the Act, under and by virtue of which they shall be appointed, instead of in the said months of *April, September, or October*.

Regulations as to meetings of trustees. — By Statute 4 Geo. 4. c. 95. s. 39, The trustees for executing any Act for making or maintaining any turnpike roads shall and may, from time to time, meet at such time and place on or near their respective roads as to them shall seem convenient, and may adjourn themselves to meet at any place or places, and at such time or times, as the said trustees or the major part of them present at any meeting shall appoint; And at all their several meetings the trustees shall pay and defray their own expences, except any sum not exceeding 10s. *per diem* for the use of the room wherein they shall meet:—And all orders and determinations of the trustees, in the execution of any such Act, shall be made at meetings to be held in pursuance thereof, or of the said recited Act (a) and this Act, and not otherwise (except in the cases otherwise particularly provided for by the said recited Act or any such Act for making or repairing turnpike roads;) and no order or determination shall be made unless the major part of the trustees present shall concur therein; and all acts, orders, and proceedings relating to any such Act, or the said recited Act and this Act, which are directed to be had, made, done, or exercised by or before the said trustees, and all the powers and authorities vested in them generally, shall and may be had, made, done, and exercised by the major part of the trustees who shall be present at the respective meetings to be held by virtue of any such Act or this Act, the whole number present being not less than three (except in such cases where any other number is by any local Act, or the said recited Act or this Act, named for any particular or special purpose); and all acts, orders, or proceedings had, made, or done by or before such

(a) 3 Geo. 4. c. 126.

three trustees shall have the same force and effect, and be binding and conclusive on all persons, and to all intents and purposes whatsoever, as fully and effectually as if the same were had, made, done, or executed by or before all the said trustees; and a chairman shall and may in the first place be appointed at every meeting to be held by virtue and for the purposes of any such local Act, or the said recited Act and this Act, who in case of an equal number of votes (including the chairman's vote) shall have the casting or decisive vote:—And no order or determination at any meeting of the said trustees once made, agreed upon, or entered into, shall be revoked or altered at any subsequent meeting, unless notice of the intention to make such revocation or alteration shall have been given by three or more trustees, by writing under their hands, to the clerk to the said trustees, at a previous meeting holden for the same road, and entered in the book of proceedings of such meeting, and unless notice, signed by any two or more trustees, shall have been affixed on all the turnpike gates then erected upon such road, twenty-one days at least before such meeting, nor unless such revocation or alteration shall be agreed to be made by a greater number of trustees than concurred in the making of any such order or determination:—Provided always, that nothing herein contained, prohibiting or restraining trustees for expending more than 10*s.* *per diem* for the use of the room wherein they shall meet, shall extend to the trustees of any road within five miles of the *Royal Exchange* in *London*; but such last-mentioned trustees may expend any sum not exceeding 20*s.* for the use of such room.

How meetings on emergencies shall be held.—By Sect. 41, If at any time it shall be thought necessary, for the

better execution of any Act of Parliament for making or maintaining any turnpike road, that the trustees of such road should meet before the time to which any meeting may be adjourned, it shall be lawful for any two or more of such trustees, (or for the clerk to the said trustees, by an order in writing signed by any two or more of them,) to give notice of such earlier meeting by advertisement in some newspaper circulated in the neighbourhood of such road, and affixed on all the turnpike gates then standing on such road, in which notice shall be expressed the time, place, and purpose of such earlier meeting (such time not being less than fourteen days after publication of the said notice); and all the orders and determinations of the trustees at all such meetings shall be as valid, as if the same had been done at any other meeting of trustees held by virtue of the said recited Act or this Act, or the Act under and by virtue of which they shall act as trustees:—Provided always, that no other business than what shall be specified in such notice shall be transacted at any such meeting.

Proceedings, &c. of trustees to be entered in a book, which shall be received in evidence.—By Stat. 3 Geo. 4. c. 126. s. 72, All orders and proceedings of the trustees of every turnpike road, together with the names of the trustees present at every meeting, shall be entered in a book or books to be kept by the clerk to the said trustees for that purpose, and be signed by the chairman of the meeting or meetings at which such orders or proceedings shall be from time to time made or had; and such book or books shall be open at all seasonable times to the inspection of any of the trustees without fee or reward:—And such orders and proceedings, so entered and signed by the chairman of such meeting or meetings, shall be deemed

and taken to be original orders and proceedings:—Which said book or books, as well as the book or books in which the oath or affirmation directed to be taken by the said trustees shall be entered, and also the book or books directed to be kept for registering mortgages and assignments, and all entries in such books respectively, shall and may be read in evidence in all courts whatsoever, in all cases of appeal, and in all prosecutions, suits and actions whatsoever.

And by *Stat. 9 Geo. 4. c. 77. s. 2*, All books kept for registering mortgages or assignments, and all entries therein, and all books containing the accounts and proceedings of the trustees in the execution of any local Turnpike Act, kept according to the directions and provisions of any such Act, or of the said recited Act (3 Geo. 4. c. 126.) or of this Act, and made evidence thereby, shall be admitted in evidence in all courts and by all judges, justices, and others, without proving the facts therein contained, unless such facts or any of them shall be first controverted, notwithstanding any former Act, under the provisions of which such books may have been originally kept, may be repealed:—And all such books shall be preserved and kept by the clerk for the time being of such trustees, and shall at all seasonable times be open to the inspection of the said trustees, and of any creditor or creditors of the tolls, without fee or reward; and the said trustees and creditors, or any of them, shall and may take copies of or extracts from the said book or books, or any part or parts thereof respectively, without paying any thing for the same; And in case the clerk to the said trustees shall refuse to permit, or shall not permit the said trustees, or such creditors, or any of them, to inspect the said book or

books, or to take such copies or extracts as aforesaid, such clerk shall forfeit and pay any sum of money not exceeding £5, for every such offence.

Books of account to be kept, and to be open to inspection by trustees and creditors.—By Stat. 3 Geo. 4. c. 126. s. 73, The trustees of every turnpike road shall, and they are hereby required, from time to time and at all times, to order and direct a book or books to be provided and kept by their clerk for the time being, in which book or books such clerk shall enter or cause to be entered, true and regular accounts of all sums of money received, paid, laid out, and expended for or on account of the roads for which such clerk shall act, and of the several articles, matters, and things for which such sums of money shall have been disbursed, laid out, and paid:—And such book or books shall, at all seasonable times, be open to the inspection of the said trustees, or any creditor or creditors on the tolls collected and taken on the road to which such books relate, without fee or reward; and the said trustees and creditors, or any of them, shall or may take copies or extracts from the said book or books, or any part or parts thereof, without paying any thing for the same; and the said book or books shall be produced by the said clerk at all meetings of the said trustees:—And in case any clerk shall refuse to permit, or shall not permit any of the said trustees, or any such creditor, to inspect any such book or book, or to take such copies or extracts as aforesaid; or in case such clerk shall refuse or neglect to produce such book or books at any meeting of the said trustees, such clerk shall forfeit any sum of money not exceeding £5, to be levied and applied in the same

manner as other penalties are hereby directed to be levied and applied (a).

Audit of the accounts of treasurer, clerk, and surveyor.—By Stat. 3 Geo. 4. c. 126. s. 78, The trustees of every turnpike road shall, and they are hereby required at their general annual meeting in each year, to examine, audit, and settle the accounts of the respective treasurers, clerks, and surveyors, appointed by them; and to require such treasurers, clerks, and surveyors to produce their books, accounts, papers, and vouchers; and to examine into the revenues and debts, distinguishing bond from simple-contract debts, of the several roads for which they shall act as treasurer, clerk, or surveyor; and when the accounts of the said several treasurers, clerks, and surveyors, shall be settled and allowed by the trustees present at such meeting, the same shall be signed by the chairman of such meeting:—And if any treasurer, clerk, or surveyor, shall refuse or neglect to produce his accounts, or any book, paper, or voucher required to be produced by him, such treasurer, clerk, or surveyor shall be dealt with according to the provisions hereinbefore contained (b), with regard to officers refusing to account or deliver up books or papers, or pay over money in their hands.

General statement of the funds of the trust to be made out and sent to the clerk of the peace.—And by the same Section, When and as soon as the said accounts of the said respective treasurers, clerks, and surveyors shall be audited, allowed, and signed, the clerk to the

(a) By section 141. See post, Chapter VI. Section III.

(b) See 4 Geo. 4. c. 95. s. 47, post, page 229.

trustees holding such meeting shall forthwith make out a statement of the debts, revenues, and expenditure received or incurred on account of the trust for which the meeting shall be held, in the form contained in the Schedule to this Act annexed (a); which said statement shall be submitted to the trustees assembled at such meeting, and when approved by the majority of them, shall be signed by the chairman of the said meeting; and the said statement being so approved and signed, the said clerk shall, within thirty days thereafter, transmit the same to the clerk of the peace of the county in which the road, or the major part thereof, to which the said statement relates, shall lie:—And if any clerk shall refuse or neglect to make out such statement as aforesaid, or to transmit the same within the time hereinbefore mentioned, every clerk so offending shall, for such offence, forfeit the sum of £50, to be recovered as hereinafter directed (b).

Statement to be produced at Quarter Sessions, and to be registered.—Section 79 enacts, That the clerk of the peace of every county to whom such statements shall be transmitted, shall, on receiving such statements, cause the same to be produced to the justices assembled at the Quarter Sessions to be held next after the receipt thereof, and also to be registered and kept amongst the records of the Quarter Sessions of the county for which such clerk of the peace shall act:—And the said statements so to be transmitted to the said respective clerks of the peace, shall, when registered, be open to the inspection of all and every person and persons whatsoever, who may take

(a) See Form, Appendix, No. LXXXVII.

(b) See section 141, post, Chapter VI. Section III.

extracts therefrom or copies thereof, paying to the clerk of the peace in whose custody the same shall be, the sum of five shillings for each inspection, and the sum of sixpence for every seventy-two words of each extract or copy taken.

Statement to be printed and sent to trustees.—By Section 80, The said trustees shall, immediately after such accounts and statements have been examined, audited, and signed, cause a sufficient number of copies of such statements to be printed, and direct their clerk to transmit a copy thereof to each acting trustee, having duly qualified himself to act as such trustee of such road.

Trustees may enter into contracts for amending roads. By Stat. 4 Geo. 4. c. 95. s. 78, It shall be lawful for the trustees of any turnpike road, or for their clerk, surveyor, or any other officer by their order, to contract and agree, by the year or otherwise, with any person for the making, amending, altering, or maintaining the said road, or any bridges, toll-houses, or buildings thereon, or for any other thing which such trustees are by any Act for making or maintaining turnpike roads, or the said recited Act (a) or this Act, or any other Act, authorized or empowered to make, build, do, execute, or perform; And all contracts or agreements in writing entered into by the said trustees, or, pursuant to any order of the said trustees, by their clerk, surveyor, or other officer, with any workmen or other persons, relating to any matter or thing to be done by virtue of any such Act, or the said recited Act, or this Act, shall be binding on the said trustees and their successors, and upon all other parties

(a) 3 Geo. 4. c. 126.

who shall sign the same, and the heirs, executors, and administrators of such other parties; and actions and suits shall and may be maintained thereon by the said trustees, and damages and costs recovered against the party or parties, or person or persons failing in the performance of such contracts or agreements respectively; and such sum or sums of money as shall be requisite for the due performance of such contract, shall be the measure of the damages to be recovered in any action or suit against such party or parties, person or persons so as aforesaid making default in fulfilling his, her, or their contract or agreement.

By *Stat.* 3 Geo. 4. c. 126. s. 100, The trustees are empowered to purchase land, for the purpose of digging materials therefrom.

Trustees and other officers, &c. may be witnesses.—By *Stat.* 4 Geo. 4. c. 95. s. 84, No person shall be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of any Act for making or maintaining any turnpike road, or the said recited Act (a), or this Act, by reason of being a trustee of such road, or a mortgagee or creditor of the tolls thereof, or a farmer, lessee, or collector of such tolls, or a treasurer, clerk, or surveyor, or other officer under such Act; nor shall such testimony or evidence, for any of the reasons aforesaid, be rejected, or liable to be questioned or set aside.

(a) 3 Geo. 4. c. 126.

AS TO THE LIABILITY OF TRUSTEES.—By *Stat. 7 & 8 Geo. 4. c. 24. s. 3*, No trustee shall be personally subject or liable (a) to be charged (except as by *sect. 2* of this Act mentioned) with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike road, nor shall execution issue against the goods and chattels of any trustee, by reason of his having acted as such trustee, or having signed, or authorized, or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have in express words rendered himself so personally liable.

But by *Section 2*, Every trustee who shall order or direct the expenditure of any money for or towards the making, repairing, or altering any road not comprehended within the Act in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorized by such Act, or by the said recited Acts (b), such trustee shall be personally liable to the trust for the re-payment of the money so expended, at the suit of any person, or any one trustee, or of the clerk to such trustees, on behalf of such trust; And all the costs and charges of such suit, over and above any costs and charges recovered from the defendant in such suit, shall be paid and borne by such trust.

Yet if in the performance of any act which the trustees are authorized to do, they behave arbitrarily, wan-

(a) That without this release, the trustees would have been personally liable, see *Horsley v. Bell* and others, *Ambl. 769*, and *1 Bro.*

C. C. 101, note, *S. C.*

(b) *3 Geo. 4. c. 126*, & *4 Geo. 4. c. 95*.

tonly, or oppressively, or are even so careless and negligent as to cause a consequential damage, which might well have been avoided, it seems that in such a case they will be personally liable to an action for the injury inflicted (*a*). But otherwise they cannot be called upon to make any recompence for such damage.

In one case, the trustees of a turnpike road, who were empowered to make water-courses to prevent the road from being overflowed, had directed their surveyor to present a plan for carrying off the water of an adjacent brook; he recommended, and on that recommendation they adopted and caused him to make, a wide channel from the road, gradually narrowing, and conducting the water into the ordinary fence ditches of the plaintiff's land, which proved insufficient to discharge it, and his land was thereby flooded by the water, which stagnated thereon, and damaged his crops. For this damage the plaintiff brought his action against the chairman of the trustees, who signed the order for cutting the trench. And it was held, that although the selection of the defendant to answer the plaintiff's suit was correct, yet the action itself was not maintainable. For the trustees, who were guilty of no excess of jurisdiction, informed themselves, as well as they could, by the opinion of their surveyor. No imputation of negligence rested upon them, and they did the act in the manner, which, according to the best information they could obtain, was the most advisable for effecting the object in view (*b*).

(*a*) See *Jones v. Bird*, 5 B. & A. 837; and *Boulton v. Crowther*, 2 B. & C. 703.

(*b*) *Sutton v. Clarke*, 6 Taunt. 29.—1 Marsh. 429. S. C.

And in the case of *Harris and Ux. v. Baker* (a), the trustees of a public road were empowered and required by an Act of Parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night-toll for the purpose of enabling them to light and watch the same. The highway had been cleansed, and the scrapings had been left in round heaps, on both sides of the road. One evening, after it was dark, there being no lamps by the road side, the plaintiff's wife, having occasion to cross the way, in her passage fell over one of these heaps and broke her arm. And it was held by the Court of K. B. that the clerk to the trustees was not liable to an action under the above circumstances. *Per* Lord Elienborough, C. J. "If, by omitting to put up lamps where it is necessary, the trustees are guilty of a breach of public duty, they may be indicted. But to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going further than any case warrants."

But although the trustees themselves may not be liable to make compensation for damage occasioned by acts ordered by them to be done, which are within the scope of their authority, if they proceed with sufficient caution, yet it should seem from the case of *Hall v. Smith and others* (b), that the agent who is appointed to execute such acts, is answerable for any negligence in their performance. This was an action brought against the clerks to certain commissioners for lighting, paving, and watching the town of Birmingham (c), and also against the

(a) 4 M. & S. 37.

(b) 2 Bing. 156.

(c) By the Act, the commis-

sioners are to sue and be sued in the name of their treasurer or clerks, who are to be reimbursed.

surveyor and contractor employed by them, and a labourer who was employed by the contractor. It appeared that the defendants dug a deep ditch in a certain street, placed a quantity of rubbish near the same, and left it at night, without any guard, fence, light, or signal; and that the plaintiff, not knowing thereof, fell into the ditch with great force, whilst riding across the street, whereby he broke his thigh, and his horse was much injured. On the trial, the jury found a verdict for the labourer, and against all the other defendants. Upon motion, the Court of Common Pleas set aside the verdict, as against the clerks to the commissioners, but confirmed it as against the surveyor and contractor. In the course of a most able judgment, Best, C. J. observed, that, "As to the surveyor and contractor, it was admitted that the verdict found against them must stand. The question to be decided was, whether the clerks to the commissioners were to have a verdict entered for them. The action is not maintainable against these defendants, unless it could have been supported against the commissioners. Now, if commissioners, under an Act of Parliament, order something to be done, which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ. If the doctrine of *respondeat superior* were applied to such commissioners, who would be hardy enough to undertake any of those various offices, by which much valuable, yet unpaid, service is rendered to the country? The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.

The commissioners here had authority to make the trench which occasioned the damage to the plaintiff; and they are not answerable for the negligent execution of an order properly given."

How trustees are to sue and be sued. — By *Statute* 3 Geo. 4. c. 126. s. 74, The trustees of every turnpike road may sue and be sued in the name or names of any one of such trustees, or of their clerk or clerks for the time being; and no action or suit to be brought or commenced by or against any trustees of any turnpike road, by virtue of this or any other Act or Acts of Parliament, in the name or names of any one of such trustees or their clerk or clerks, shall abate or be discontinued by the death or removal of such trustee, clerk or clerks, or any of them, or by the act of such trustee, clerk or clerks, or any of them, without the consent of the said trustees; but any one of such trustees, or of the clerk or clerks for the time being to the said trustees, shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants (as the case may be) in every such action or suit:—Provided that every such trustee, clerk or clerks, shall be reimbursed and paid out of the monies belonging to the turnpike road for which he or they shall act, all such costs, charges, and expences as he or they shall be put unto, or become chargeable with, or liable to, by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants.

In the case of *Escrett v. Cooch* (a), the plaintiff brought an action of *assumpsit* against the treasurer appointed under a Turnpike Act, under the following cir-

(a) 7 Taunt. 1.

cumstances. The plaintiff was a lessee of tolls, at the time when a new Act passed, which enacted, That the then existing lease of the tolls, payable at the plaintiff's gate, should determine; and if the lessee thereof should make it appear to the trustees, that any loss would be sustained by him in consequence thereof, then any five or more trustees were authorized to make compensation for the same to the lessee. If the trustees should refuse to make such compensation, the same might be sued for in any Court of Record at Westminster. And there was a clause in the Act, that in case any person should deem himself aggrieved by any thing done by the trustees under that Act, he should sue the treasurer. The plaintiff delivered to the trustees, at their first meeting, an account of his receipts, and offered to prove a profit for which he required compensation. The trustees thought his demand too high, and adjourned the meeting, *promising to consider of it*. The plaintiff became the highest bidder for the new lease, upon terms more beneficial than those under which he had taken the old one, and the trustees informed the plaintiff, that they considered the benefit which he would receive thereby, to be a sufficient compensation for the loss he had sustained. The Court of C. P. held that this action against the treasurer was not maintainable. *Per Cur.*: The Act puts the treasurer in the place of the trustees, but this action supposes that if the Act had not substituted the treasurer, the plaintiff might have sued the entire body of trustees. The act of those trustees who were present at the meeting, and promised, would not render the whole body liable to an action. We will not undertake to say, whether the Legislature may not have introduced, with intention to give a remedy, a clause which proves ineffectual; but, as the case stands, there must be judgment of *nonsuit*.

Actions against trustees, and evidence of their situation.
By Stat. 3 Geo. 4. c. 126. s. 134, It is enacted, That in all cases where any action shall be brought by or against any trustee of any turnpike road, evidence of such trustee *having acted as such*, together with the Act of Parliament by which he was appointed, or the order, or a copy of the order, for his appointment or election, in case he was appointed or elected by the trustees, shall be sufficient proof of his being a trustee.

As to the recovery from trustees of money for compensation or satisfaction for materials, damage, &c.—By Stat. 4 Geo. 4. c. 95. s. 71, When and as often as any sum or sums of money shall be directed or ordered to be paid by any justice or justices of the peace, in pursuance of Stat. 3 Geo. 4. c. 126, or this Act, or any Act relating to turnpike roads, as or by way of compensation or satisfaction for any materials or costs, or for any damage, spoil, or injury of any nature or kind whatsoever, done or committed by such trustees, or any person or persons acting by or under their authority, and such sum or sums of money shall not be paid by the said trustees to the party or parties entitled to receive the same, within ten days after demand in writing shall have been made from the clerk to the said trustees, or their treasurer, in pursuance of the direction or order made by such justice or justices, and in which demand the order of such justice or justices shall be stated, then and in such case the amount of such compensation or satisfaction shall and may be levied and recovered by distress and sale of the goods and chattels vested in such trustees, by virtue of any Act for making or repairing turnpike roads, or of the goods and chattels of their treasurer for the time being, under a warrant to be issued for that purpose by such justice or justices; which warrant any such justice or justices is and are

hereby authorized and required to grant under his hand and seal, or their hands and seals, on application made to him or them for that purpose by the party or parties entitled to receive such sum or sums of money as or by way of compensation or satisfaction for any such materials, costs, damages, spoil, or injury as aforesaid:—And in case any overplus shall remain after payment of such sum or sums of money and the costs and expences of hearing and determining the matter in dispute, and also the costs and expences of such distress and sale, then and in such case, such overplus shall be returned on demand to the said trustees, or to their treasurer for the time being, as the case may be:—Provided always, that it shall be lawful for such treasurer to retain out of any monies, which he shall have received or shall receive in pursuance of any such Act, or the said recited Act or this Act, all such damages, costs, charges, and expences as he shall have sustained or be put unto by virtue of any such warrant as aforesaid.

RIGHT OF PROPERTY VESTED IN TRUSTEES (a). — By *Stat. 3 Geo. 4. c. 126. s. 60*, It is enacted, That the right, interest, and property of and in all the toll-gates and toll-houses, weighing machines, and other erections and buildings, lamps, bars, toll-boards, direction-boards, mile-stones, posts, rails, fences, and other things which shall have been or shall be erected and provided in pursuance of any Act of Parliament for making turnpike roads, with the several conveniences and appurtenances thereunto respectively belonging, and the materials of which the same shall consist, and all materials, tools, and implements,

(a) By 9 Geo. 4. c. 77. s. 16, (post, p. 252) the tolls, to be col-

lected on any turnpike road, are vested in the trustees.

which shall be provided for repairing the said roads, and the scrapings of the said road, shall be vested in the trustees acting in pursuance of such Act for the time being; and they are hereby authorized and empowered to apply and dispose of the same as they shall think fit, and to bring or cause to be brought any action or actions, and to prefer and prosecute or order and direct the preferring and prosecuting of any informations or indictments, against any person or persons who shall dig up, break, or pull down, steal, take, or carry away, spoil, destroy, injure, or damage any of the toll-gates, or toll-houses, weighing machines, or other erections or buildings, lamps, bars, toll-boards, direction-boards, mile-stones, posts, rails, fences, and other things, or any of the conveniences and appurtenances thereto belonging, or any of the tools, implements, or materials aforesaid, or shall interrupt them, the said trustees, or any of their officers, in the possession thereof;—In all which proceedings it shall be sufficient to state generally such articles to be the property of the clerk for the time being to the said trustees.

By *Stat. 4 Geo. 4. c. 95. s. 57*, Where any toll-house or toll-houses standing on or adjoining any turnpike road, and which shall have been erected by or vested in the trustees of such road, shall become useless and be no longer required for the purposes of such road, it shall not be lawful for the trustees of such road to sell or dispose of such toll-house or toll-houses, but in every such case the trustees of the road on which such toll-house or toll-houses no longer required shall stand, shall cause such toll-house or toll-houses, with the out-houses attached or belonging thereto, to be pulled down, and the materials thereof to be sold or removed; and the site of such toll-house or toll-houses so pulled down, together with the

gardens and appurtenances thereunto belonging, may then be sold by the said trustees, in the same manner as and under the regulations in 3 Geo. 4. c. 126, and this Act contained, with respect to any land or ground not wanted for the purposes of the road (a).

By *Section 58*, During such time as the tolls, arising on any turnpike road or any part or parts thereof, shall be leased, demised, or let to any person or persons whomsoever, it shall be lawful to and for the lessee or lessees, or farmer or farmers thereof, or such other person or persons as he or they shall authorize or appoint, to occupy and enjoy the toll-house or toll-houses at which the said tolls so let are to be collected and to arise, with all the appurtenances and conveniences to the same toll-house or houses belonging, for the purpose of collecting such tolls during so long time only as such lessee or lessees, farmer or farmers, shall duly and regularly pay his, her, or their rent or rents, and perform the covenants, agreements, and conditions of such lease, demise, or letting, but no further or otherwise.

By *Section 59*, In case all or any of the tolls, arising by virtue of any Act for repairing or amending any turnpike road, shall have been or shall be demised or let to farm to any person or persons in any manner whatsoever, and the lessee or lessees, farmer or farmers thereof, shall neglect or refuse to perform the terms and conditions on which the same shall have been or shall be so demised or let; or in case the rent or rents, agreed to be paid by such lessee or lessees, farmer or farmers, shall be in arrear by the space of seven days next after any of

(a) See post, Chapter V. Section II, Part 2.

the days on which the same ought to be paid, pursuant to the agreement for letting to farm thereof; or in case any such lease or agreement shall in any other manner become void; then and in any of those cases, it shall be lawful for any justice of the peace for the county or place, by warrant under his hand and seal, to order a constable or other peace officer, with such assistance as shall be necessary, to enter upon and take possession of any toll-house or toll-houses, toll-gate, bar, or chain, or weighing machine, and the buildings and appurtenances thereunto belonging, and to remove and put out such lessee or lessees, farmer or farmers of the tolls arising thereat respectively, or other person or persons who shall be found therein, together with his, her, or their goods, out of and from the possession of the said toll-house or toll-houses, and from the collection of tolls, and to put the said trustees or any one of them, or their new appointed officer, or other person acting by or under their authority, into the possession thereof:—And thereupon it shall be lawful for the said trustees (if they shall think fit) to vacate and determine the contract or agreement (if any) for demising or letting the said tolls to such lessee or lessees, farmer or farmers, and the same shall be from that time utterly void to all intents and purposes, (save as to the covenants and agreements for payment up to that time of the rent or rents thereby reserved, or other covenants and agreements on the lessee's part which shall have been holden) as if such demise or agreement had never been made:—And it shall be lawful for the said trustees, in every such case, to demise or let to farm the said tolls again to any other person or persons, or cause them to be collected, as if no former demise, contract, or agreement, had been made relative thereto.

As to the trustees' right to the soil of the road.—In the case of *Davidson v. Gill* (a), Lord Kenyon, C. J. observed, that the soil of a turnpike road was not vested in the trustees, but remained in the persons who were entitled to it before the Act passed, by which they were appointed: the trustees have only the controul of the highway.

If, then, the soil of a turnpike road is not vested in the trustees, much less can they be possessed of the mines and minerals therein; it can, therefore, only be *ex abundante cautela*, that by Stat. 7 & 8 Geo. 4. c. 24. s. 18, the Legislature has declared, That all mines, &c. which shall be discovered or found in or under any land to be used for any turnpike road, shall be and they are hereby reserved to the person, &c., who would have been seised of or entitled to the same, in case the Act for making such road had not been passed, with liberty for him, or his agents or servants, to dig for, mine, and work the same, in such manner as is usual for carrying on works of that kind in the county, district, or place where such mines shall be found, in as full and ample a manner as if the said land had not been appropriated and taken for the purposes aforesaid, so that in the working thereof no damage shall be done to such road or any part thereof.

Power to sell the soil of unnecessary roads.—However we shall see in the next Chapter, where it is intended to treat of the diversion and extinction of highways and

(a) See 1 East, 69—and see *Goodtitle v. Alker* and *Elmes*, 1 Burr. 133, and ante, Chap. II. as to the right to the soil of a highway. And see Stat. 4 Geo. 4.

c. 95. s. 75, where provision is made for the preservation of the right of pasturage along the sides of turnpike roads.

turnpike roads, that by the Turnpike Acts, the soil of the road appears to be absolutely vested in the trustees, (with the exception of all mines, minerals, &c.) for the particular purpose only of effecting a sale of any road, for which a new one shall have been substituted according to the provisions of the Act.

Power to sell unnecessary tenements.—By Stat. 4 Geo. 4. c. 95. s. 63, In case the trustees for making or maintaining any turnpike road shall become possessed of any tenements or hereditaments which are useless or unnecessary for the purposes of such road, it shall be lawful for the said trustees to sell and dispose of the same, in such and the same manner as by the said recited Act (a) they are authorized and empowered to do, in the cases of any land or ground not wanted for the purposes of such road.

II. *As to other officers.*

Trustees to appoint officers, with salaries.—By Stat. 4 Geo. 4. c. 95. s. 43, The trustees for making or maintaining any turnpike road may, and they are hereby empowered, by writing under their hands, to appoint such collector or collectors of the tolls arising on such road, and clerk or clerks, treasurer or treasurers, surveyor or surveyors of the said road, and such other officers as the said trustees shall think necessary; and such collectors, clerks, treasurers, surveyors, and other officers, or any of them, from time to time to remove; and on removal, death, or resignation of any such collectors, clerks, treasurers, surveyors, or other officers, to appoint others in their stead:—And may and are hereby authorized and

(a) 3 Geo. 4. c. 126. See post, Chapter V. Section II. Part 2.

empowered, out of any of the monies arising on such turnpike road, to allow and pay to the several collectors, clerks, treasurers, surveyors, and other officers, and to such other person or persons as shall be assisting them or any of them, in or about the execution of the Act for making or maintaining such road, and the said recited Act (a) and this Act, such salaries, rewards, and allowances for their attendance, care, labour, and services, as such trustees shall deem reasonable.

Treasurer and clerk not to be the same person.—By Stat. 7 & 8 Geo. 4. c. 24. s. 4, It is enacted, That it shall not be lawful for any trustees to continue or appoint the person, who has been or may be appointed their clerk in the execution of any Act for repairing or maintaining any turnpike road, or the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, the treasurer for the purposes of such Act; or to continue or appoint any person who has been or may be appointed treasurer, or the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer or of his partner, the clerk for the purposes of such Act :—And if any person shall accept both the offices of clerk and treasurer for the purposes of such Act, or if any person being the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, shall accept the office of treasurer, or shall act as deputy of the treasurer, or in any manner officiate for the treasurer; or being the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer or of his partner, shall accept the

(a) 3 Geo. 4. c. 126.

office of clerk in the execution of such Act, or shall act as deputy of such clerk, or in any manner officiate for such clerk ; or if any such treasurer shall hold any place of profit or trust under the said trustees other than that of treasurer, every such person so offending shall, for every such offence, forfeit and pay the sum of £100, to any person who shall sue for the same, to be recovered, with full costs of suit, in any of his Majesty's Courts of Record at Westminster, by action of debt, or on the case, or by bill, suit, or information, wherein no essoign, protection, wager of law, nor more than one imparlance, shall be allowed.

Surveyor and Clerk not to be the same Person.—And by Stat. 4 Geo. 4. c. 95. s. 44, It shall not be lawful for the trustees, acting under any Act for making or maintaining any turnpike road, to continue or appoint the person or persons, who has been or may be appointed their clerk or clerks in the execution of such Act, or the partner of any such clerks, or the clerk or clerks, or other person or persons in the service or employ of any such clerk or clerks, the surveyor or surveyors, for the purposes of such Act; or to continue or appoint any person or persons who has been or may be appointed surveyor or surveyors, or the partner or partners of such surveyor or surveyors, the clerk, or clerks to the said trustees:—And if any person shall accept both the offices of clerk and surveyor for the purposes of such Act, or if any person being the partner of any such clerk or clerks, or other person or persons in the service or employ of any such clerk or clerks, shall accept the office of surveyor; or being the partner of any such surveyor, or surveyors, shall accept the office of clerk in the execution of such Act; and if any such surveyor shall hold or accept any

place or office of profit or trust under the said trustees other than that of surveyor, every such person so offending, shall, for every such offence, forfeit and pay the sum of £50, to any person who shall sue for the same, to be recovered, with full costs of suit, in any of his Majesty's Courts of Record at Westminster, by action of debt, or on the case, or by bill, suit, or information, wherein no essoign, protection, or wager of law, nor more than one imparlance, shall be allowed.

Victuallers not to be appointed.—By Stat. 3 Geo. 4. c. 126, s. 75, No person shall be capable of holding any place of profit under any trustees of any turnpike road, who shall sell any wine, ale, spirituous liquors, or provisions by retail.

Surveyor not to have an interest in any contract, &c.—By Stat. 4 Geo. 4. c. 95. s. 45, If the surveyor of any turnpike road shall have any part, share, or interest, in any contract or bargain for work, materials, tools, or other things, to be done or provided upon, for, or on account of any road or bridge, or any part thereof, under his care and management, or shall upon his own account, directly or indirectly, let to hire any team, or sell or dispose of any timber, stone, or other materials to be used or employed in making or repairing any such road or bridge, he shall forfeit for every such offence the sum of £50.

Treasurer to give security.—By Stat. 3 Geo. 4. c. 126. s. 76, The trustees of every turnpike road shall, and they are hereby required to take sufficient security from every treasurer to be appointed by them for the purposes of any Act or Acts of Parliament for making, repairing, or maintaining any turnpike road, for the due and faith-

ful execution of his office, before such treasurer shall enter upon his office; And if they shall so think proper, shall and may also take such security from any other officer to be appointed under or by virtue of this or such other Act (a).

Two trustees may appoint temporary collector, in case of death or other removal of former collector.—By Stat. 4 Geo. 4. c. 95. s. 49, Upon the death, incapacity, refusal, neglect, or absconding, of any collector or receiver of tolls at any turnpike or weighing machine upon any turnpike road, any two or more trustees, though not assembled at any meeting, by writing under their respective hands, shall and may nominate and appoint a proper person in his place, to continue until the then next meeting of the trustees of such road, in the stead of such collector or receiver as shall so die, become incapable, refuse, neglect, or abscond; which person so nominated and appointed shall have the like power and authority, and be answerable and accountable in the same manner, in all respects, as the person who shall die, become incapable, refuse, neglect, or abscond, would have had or been subject to if living:—And if any collector or receiver of tolls as aforesaid, who shall be discharged from his office by the said trustees, or the wife or widow, or any of the children, family, or representatives of any collector or receiver who shall die, abscond, refuse, or neglect to perform his duty, or be discharged, or any other person, having the possession of any toll-house, or buildings, or weighing machine erected by virtue of any Act for repairing turnpike roads or the said recited Act (b), shall neglect or refuse to deliver up possession for the space of

(a) See Form of Security, Appendix, No. LXXIX.

(b) 3 Geo. 4. c. 126.

three days after demand thereof made, and notice in writing given for that purpose, by any two or more of such trustees, or by their clerk or treasurer, then and in any of the said cases it shall be lawful for any justice of the peace for the county or place, where such toll-house, or building, or weighing machine shall be situate, by warrant under his hand and seal (*a*), to order any constable or other peace officer for the same county or place, with such assistance as shall be necessary, to enter such house, or building, or weighing machine in the day-time, and to remove the person who shall be found therein, together with his, her, or their goods, out of the same, and to put the said trustees, or any of their officers, in the possession thereof.

Penalty on collectors for misconduct. Their names to be placed on toll-houses.—By Stat. 3 Geo. 4. c. 126. s. 52, If any collector or other person appointed to collect the tolls on any turnpike road, shall permit or suffer any waggon, wain, cart, or other carriage to be drawn or pass upon any turnpike road within the view or with the knowledge of such collector or toll-gatherer, or to pass through any toll-gate or bar, with the wheels of a less breadth, or of a different construction, than by this Act allowed (*b*), or without such names and descriptions painted thereon as are hereinafter directed (*c*), and shall not, within the space of one week, proceed for the recovery of the forfeiture or penalty hereby inflicted; or shall allow any coach, chariot, waggon, cart or other carriage, or any passenger to pass through any toll-gate at which such collector or other person shall be stationed, without paying

(*a*) See Form, Appendix, No. LXXVIII.

(*b*) See post, under the 5th head of this Section.

(*c*) See post, Chapter VI. Section III.

the toll payable; or shall be guilty of any other misconduct in his office, every collector or other person so offending, and being thereof convicted before one justice, shall forfeit for every such offence any sum not exceeding £5, as the justice by and before whom such offender shall be convicted shall judge proper.

By *Stat. 4 Geo. 4. c. 95. s. 30*, Every toll collector on every turnpike road shall place, or cause to be placed, on some conspicuous parts of the fronts of the several toll-houses at which they shall be respectively stationed, and so that the same shall appear to public view, their christian and surnames, painted in black on a board with a white ground, each of such letters of such name or names to be at least two inches in length, and of a breadth in proportion; and such board shall be and remain at such toll-house during the whole of the time that the person whose name shall be expressed thereon shall be on duty thereat:—And if any collector of the said tolls shall not place such board, and keep the same there during the time he shall be such collector as aforesaid; or shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any Act, or of the orders and resolutions of the trustees made in pursuance thereof; or shall demand and take a toll from any person who shall be exempt from the payment thereof, and who shall claim such exemption (α);

(α) Under a former Act it has been decided, that an indictment for extortion, for taking toll where the party claimed an exemption from toll, could not be sustained, where it appeared that the ground for such exemption was not ex-

pressly specified to the turnpike-gate keeper, at the time the toll was demanded by him; although the nature of the exemption was apparent, from the substance (manner) with which the cart was loaded. *Rex v. Hamlyn*, 4 Campb.

or shall refuse to permit or suffer any person to read, or shall in anywise hinder any person from reading the inscriptions on such board; or shall refuse to tell his christian and surname to any person who shall demand the same, on being paid the said tolls or any of them, or shall, in answer to such demand, give a false name or names; or shall refuse or omit to give to the person paying the toll a ticket denoting the payment of the tolls, and naming and specifying the toll-gate at which such ticket has been delivered, and the toll-gate or toll-gates (if any) freed by such payment; or upon the legal toll being paid or tendered shall unnecessarily detain, or wilfully obstruct, hinder, or prevent any passenger from passing through any turnpike or toll-gate; or shall make use of any scurrilous or abusive language to any trustee, traveller, or passenger, then and in every such case every such toll-collector shall forfeit and pay any sum not exceeding £5 for every such offence.

By *Section 50*, It is provided, That no person who shall ask and take more toll than he is authorized to take by this Act, or any Act now in force, or by any Act hereafter to be made and passed, shall be prosecuted by indictment for extortion, or otherwise, nor shall any other proceeding be adopted against such person for the offence aforesaid, other than by prosecuting for the forfeiture and penalty before a justice of the peace, as is herein or by the said recited Act (a) directed.

379. By the 50th Section, next noticed in the text, the procedure by indictment for extortion on the part of a collector, is taken away, and a summary conviction before a justice of peace substituted for it. But the express notice re-

quired in the above case, must, it should seem, still be given to the collector, before he can be liable to the penalty inflicted by this Section.

(a) 3 Geo. 4. c. 126.

If toll-collectors abscond, penalties to be levied, &c.— By Stat. 3 Geo. 4. c. 126. s. 54, In case any toll-collector, or person acting as such shall offend against any of the provisions of this Act, whereby any penalty shall be incurred, and shall abscond or absent himself so as not to be found, then it shall be lawful for any justice of the peace, before whom any such toll-collector or person shall have been convicted of any such offence, in case of such collector or other person absconding after conviction, or in case of his or her absconding previous to conviction, then for any other justice of the peace acting for the county, on an examination of the circumstances, and ascertaining, by the examination of witnesses, that such offence has been committed by the person absconding, to order and adjudge that the penalty incurred as aforesaid shall be paid by the lessee, or farmer of the tolls under whom such collector or other person shall act; all which penalties shall be levied and recovered from such lessee or farmer, and applied in manner hereinafter directed (a).

Collector, &c. not to gain a settlement, or be assessed to any public rate.— By Sect. 51, No collector or person renting such tolls, or residing in such toll-house as aforesaid, and no apprentice or servant of any such collector or person, shall thereby gain a settlement in any parish or place whatsoever:—And no tolls to be taken at any gate erected or to be erected by the trustees of any turnpike road, nor toll-house erected or to be erected for the purpose of collecting the same, nor any person in respect of such tolls or toll-house, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial levy whatsoever.

(a) By s. 141. See post, Chapter VI. Section III.

And by *Stat. 4 Geo. 4. c. 95. s. 31*; No collector or receiver of any tolls or penalties for over-weight, residing in any house or building erected or used by the trustees of any turnpike road for the residence or accommodation of persons appointed for weighing any waggons or other carriages; and no apprentice or servant of any such collector or receiver, shall thereby gain a settlement in any parish or place:—And no tolls or penalties for over-weight to be taken at any house or weighing-machine erected or to be erected, or adjoining to any turnpike road, nor any person whatsoever, in respect of such tolls or penalties, or any house or building as aforesaid, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial rate or levy whatsoever.

Officers to continue in office after any Act is repealed, unless removed by trustees.—By *Statute 9 Geo. 4. c. 77. s. 15*, It is enacted, That the treasurer, if appointed consistently with the provisions of the said recited Acts (a); and each and every clerk, receiver, collector, and surveyor, and other officer, appointed under or employed in the execution of any Act for making or maintaining any turnpike road, which may have expired or been repealed, shall hold and enjoy such their several and respective offices and employments until removed therefrom respectively by the trustees for executing any subsequent Act for maintaining the same turnpike road; and each and every such treasurer, clerk, receiver, collector, surveyor, and other officer, shall have the like powers and authorities for the purpose of any such subsequent Act, and shall be subject and liable to the like pains and penalties,

(a) 3 Geo. 4. c. 126.—4 Geo. 4. c. 95.—and 7 & 8 Geo. 4. c. 24.

and to the like powers of removal, and to the like rules and regulations in all respects whatsoever, as if he or they had been appointed under or by virtue of such subsequent Act.

Officers to account when required—Mode of proceeding on neglect to do so. — By Statute 4 Geo. 4. c. 95. s. 47, All such officers as shall have been or shall be appointed by any trustees of any turnpike road, shall from time to time, when thereunto required by the trustees, deliver to such trustees, or to such person or persons as they shall for that purpose appoint, true, exact, and perfect accounts in writing, under their respective hands, of all monies which they and every of them respectively shall have received to that time, by virtue of any Act, and how much thereof hath been paid and disbursed, and for what purposes, together with the proper vouchers for such payments; and shall pay all such monies as shall remain in their or any of their hands to the said trustees, or to such person or persons as they shall appoint to receive the same, and not otherwise, within such time as such trustees shall limit or appoint:—And if any such officer or person shall refuse or neglect to produce or deliver up such accounts, and the vouchers relating to the same, or shall refuse or neglect to pay the money due on such account within the time or in manner aforesaid, or if any such officer or person shall refuse or neglect to deliver up to the said trustees, or to such person or persons as they shall appoint, within ten days after being thereunto required by the said trustees, all the books, papers, or writings in his custody or power, relating to the execution of any such Act, then and in every or any of the said cases, it shall be lawful for any one justice of the peace for the county in which such road or any part

thereof shall be situate, upon complaint (a) made to him by or on behalf of the said trustees, and such justice is hereby required, by warrant under his hand and seal to summon (b) such officer or officers, person or persons, to appear before him, and upon his, her, or their appearing, or not being to be found, to hear and determine the matter of such complaint in a summary way, and to settle the said account or accounts, if produced; and if upon confession of the officer or officers, person or persons, against whom any such complaint shall be made, or by the oath or oaths of any witness or witnesses, (which oath such justice is hereby empowered and required to administer, without fee or reward), or upon inspection of the said accounts, if produced, it shall appear to such justice, that any of the money which shall have been collected or received shall be in the hands of such officer or officers, person or persons, such justice may, and he is hereby authorized and required, on non-payment thereof, by a warrant or warrants (c) under his hand and seal, to cause such money to be levied by distress and sale of the goods and chattels of such officer or officers, person or persons respectively; and if no goods and chattels can be found (d) sufficient to answer and satisfy the said money, and the charges of distraining and selling the same, or if such officer or officers, or other person or persons, shall not appear before the said justice at the time and place by him appointed for that purpose, unless for some sufficient reason, or if appearing, shall refuse or neglect to give and deliver to such justice an account or accounts of all receipts and payments as aforesaid, or to

(a) See Form, Appendix, No. LXXXI.

(b) See Form, Appendix, No. LXXX.

(c) See Form, Appendix, No. LXXXIII.

(d) See Form, Appendix, No. LXXXIV.

produce and deliver up to the said justices the several vouchers and receipts relating to such accounts respectively, or the books, accounts, papers, and writings in his, her, or their custody or power relating to the execution of any Act for making or repairing turnpike roads, or the said recited Act or this Act; then and in either of the cases aforesaid such justice may, and he is hereby authorized and required, by warrant under his hand and seal (a), to commit such officer or officers, or person or persons, to the common gaol or house of correction of the county in which such road shall be situate, there to remain without bail or mainprize, in case he or they shall be committed for non-payment of any money received by him or them, or in his or their hands, until he shall have accounted for and paid the full amount thereof, or compounded with the trustees, and paid such composition in such manner as the said trustees shall appoint (which composition the said trustees are hereby empowered to make); or in case he or they shall be committed for not delivering any account-books, papers, or writings as aforesaid, until he or they shall have delivered up such books, papers, and writings as aforesaid, or made satisfaction in respect thereof to the said trustees:—Provided that no person, who shall be so committed for want of sufficient distress, shall be detained in prison by virtue of this Act for a longer space of time than six calendar months.

Officers under expired Act, to account with trustees under the new Act.—By Stat. 9 Geo. 4. c. 77. s. 14, All persons who may be, or shall have been employed, or who shall have received any tolls or other money on account of or for the purposes of any Act, for making or

(a) See Form, Appendix, No. LXXXV.

maintaining any turnpike road, which may have expired or been repealed, or who may have or shall have had in their custody or possession any money, books, papers, writings, or other things relating to any such turnpike road, shall account for and pay and deliver over the same and every part thereof, to the trustees for executing any subsequent Act for maintaining such turnpike road, in like manner and under the like penalties, as the several collectors and other persons receiving any money by virtue of the said recited Acts (a), and of any local Turnpike Act, are by the same recited Acts required to pay or account for the same.

General penalty on officers, &c. refusing to execute the Act.—By Stat. 3 Geo. 4. c. 126. s. 136, Every constable, headborough, or tithingman refusing or neglecting to put this Act into execution, or to account for and deliver ~~may~~ forfeiture or penalty according to the directions of this Act, and every surveyor of any turnpike road, and every toll collector and all other persons employed or to be employed by any trustees appointed or to be appointed for the repairing roads, who do or shall receive salaries or rewards, who shall wilfully neglect, for the space of one week after any offence being to their knowledge committed, to lay such information upon oath before one or more of his Majesty's justices of the peace for the limit wherein such offence was committed, as by this Act is directed, shall upon due information (b) made upon oath before one of his Majesty's justices of the peace for the said limit, forfeit for every such neglect the sum of £5.

(a) 3 Geo. 4. c. 126—and 4 Geo. 4. c. 95.

(b) See Form, Appendix, No. LXXXI.

Collectors to be competent witnesses.—By *Stat. 3 Geo. 4. c. 126. s. 59*, In case any dispute, suit, or litigation shall arise touching or in anywise relating to the tolls granted by any Act, the person appointed to collect the same, or any other person acting under the authority of the trustees, shall not be incompetent to give evidence in any such dispute, suit, or litigation, on account of his being appointed to collect such tolls (a).

As to the liability of officers and agents appointed by the trustees.—It has been shewn (b), that if the trustees act within the scope of their authority, and use due caution in their proceedings, and their conduct is not malicious or negligent, they can never be called upon to make compensation in damages for any consequential injury to others, flowing from the execution of their orders. Nor in such a case will the agents acting under the authority of the trustees, be considered liable to be sued, if the loss suffered by a third party be one which is the unavoidable consequence of the act authorized to be executed, and if it does not arise from the misconduct of the workmen. Some individuals suffer an inconvenience under most of these Acts of Parliament; but the interests of individuals must give way to the accommodation of the public. Whenever the Legislature think it necessary, they enable the commissioners to award satisfaction for the injury they may occasion; but if there be no such provision, the parties are without remedy (c).

Where, however, the contractors, or surveyor, or other agents under the trustees are guilty of *laches* or neg-

(a) See 4 Geo. 4. c. 95. s. 84, ante, p. 206.

(b) See ante, p. 207, et seq.

(c) See *The Governor, &c. of Cast Plate Manufacturers v. Meredith and others*, 4 T. R. 794.

ligence, and *à fortiori* if they are guilty of gross misconduct, they are personally answerable for the consequences; although the act ordered to be done was in itself lawful, and warranted by the powers vested in the trustees. Thus in the case of *Hall v. Smith* (a), we have seen that the surveyor and contractor, employed by certain paving commissioners, were held liable upon an action brought for an injury inflicted through their leaving unguarded, during the night, a trench, over which the plaintiff fell, and broke his leg, notwithstanding the commissioners themselves were acquitted.

So in the case of *Jones v. Bird and others* (b), the plaintiff brought his action against the defendants, who were employed under the commissioners of sewers. It appeared that the sewer, which it was necessary to repair, passed close to five houses adjoining to that belonging to the plaintiff, and that a stack of chimneys belonging to one of those houses was built upon the arch of the sewer. In the execution of the work, it became necessary to rebuild this arch, and in order to support the chimneys in the mean time, a transum and two upright posts were placed under them in order to support them, but without success; the chimneys fell, and in consequence of their fall, the adjoining houses, including the plaintiff's house, fell also. There was no specific notice given to the owner of the house to which the chimneys belonged of their dangerous state, or that it would be necessary for him to take them down. But there was a general notice to the inhabitants to secure their houses while the sewer was repairing. The jury, at the trial, were of opinion,

(a) Ante, p. 209.

(b) 5 B. & A. 837

that the defendants had conducted themselves negligently in their execution of the work intrusted to them, and accordingly found a verdict for the plaintiff; which verdict the Court of King's Bench refused to disturb. *Per* Bayley, J. "The defendants were bound to conduct themselves in a skilful manner." And *per* Best, J. "Here, too, the action was brought against the parties who negligently executed, and not against the party giving the order, as in *Sutton v. Clarke*" (a). From this observation, it may be inferred, that, in the case alluded to, the surveyor would have been considered liable, although the trustees were held not to be responsible.

Where, however, a remedy is given as against the trustees, then it should seem, that no action will be maintainable against their surveyor or agents, unless, indeed, in the case of a *tort* (b). Therefore it has been decided, that the surveyor of a turnpike road is not personally liable to answer for wages to labourers, for their work in repair of the road; but that the commissioners or their treasurer, are the proper party to be sued (c).

But if the contract is entered into personally with such agent, and he voluntarily stakes his individual credit, it appears, according to the case of *Meriel v. Wymond-sold* (d), that he will thereby render himself responsible. There the plaintiff had agreed with two of the defendants to pave their streets in Putney; and they on the behalf of the pariah agreed to pay him for them, which agreement was put into writing, and remained in the

(a) See ante, p. 208.

(b) See 6 Taunt. 35.

(c) *Pochin v. Pawley*, 1 W. Bl. 670.

(d) *Hardres*, 205, pl. 5.

hands of the defendant *Wymondsold*. The work was done according to the agreement, and it came to £360; and for satisfaction the plaintiff preferred his bill in equity against them with whom he had agreed, and against others of the parish, who had agreed with the undertakers for the parish to pay their shares: And *per Curiam*, "The plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the defendants; and the undertakers must take their remedy against the rest of the parish."

SECONDLY.—*As to the procuration of materials for making the repairs.*

Power to get materials, gratis, from waste and common land; and from inclosed land, upon making satisfaction. By Stat. 3 Geo. 4. c. 126. s. 97, It is enacted, That it shall be lawful for the surveyor or surveyors to the trustees of every turnpike road, and for all such persons as he or they shall appoint, to search for, dig, gather, take, and carry away any materials for making or repairing any turnpike road, out of any common river or brook (not being within fifty yards of any bridge, dam, weir, or jetty), or out of or from any waste or common in any parish, hamlet, or place, in which any part of such road may lie, or in any adjoining parish, hamlet, or place, and to haul and carry away such materials when got, over any common or waste lands, without paying any thing for such materials, and without being deemed a trespasser or trespassers; the said surveyor or surveyors, or other person or persons, filling up the pits or quarries, levelling the grounds, or sloping down the banks where-

from such materials shall be taken, or railing or fencing off such pits or quarries, so that the same shall not be dangerous to any persons or cattle, and paying or tendering for the damage done by going through and over any inclosed lands or grounds for or with such materials, and such damages to be ascertained as hereinafter mentioned : And also that it shall be lawful for the said surveyor or surveyors, and such person or persons as he or they shall appoint, to search for, dig, get, gather, take, and carry away any such materials, in or out of the land of any person or persons where the same may be had or found, in any parish, hamlet, or place in which any part of such road shall lie or be situate, or *in any adjoining* parish, hamlet, or place (not being a garden, yard, park, paddock, planted walk, or avenue to any house, or any piece of ground planted and set apart as a nursery for trees), making or tendering such satisfaction for such materials, and for the damage done to the owners or occupiers of the lands where and from whence the same shall be dug, gathered, and carried away, or over which the same shall be carried, as the said trustees shall judge reasonable:—And also to land on and carry through or over any inclosed lands or grounds (not being a garden, yard, park, paddock, planted walk, or avenue to a house, or any piece of ground planted and set apart as a nursery for trees), or on, through, or over any open land or common, any stone or other materials for making or repairing such road, or for building or repairing any present or future toll-house or toll-houses on or by the sides thereof, from any river, stream, or canal, in any parish, hamlet, or place in which any such road lies, or in any adjoining parish, hamlet, or place, paying or tendering, for the damage done in landing on or going through or over any inclosed lands or grounds for or with such materials,

such sum or sums of money as the said trustees shall judge reasonable:—And in case of any difference between such trustees, surveyors, or other persons appointed or employed as aforesaid, and the owners and occupiers of such lands, or any of them, concerning such payment and damages, any two or more justices of the peace for the county wherein the place from whence such materials shall have been taken shall be situate, on ten days' notice thereof being given in writing by either party to the other, shall hear, settle, and determine the matter of such payments and damages, and the costs attending the hearing and determining the same (a).

By *Stat. 7 & 8 Geo. 4. c. 24. s. 15*, It is provided, that the trustees shall not be required to pay any larger sum as a satisfaction for any materials raised, taken, or carried away from any lands or grounds for making or repairing any turnpike road, than such sum of money as it shall appear to the two justices, settling and determining such satisfaction, that such materials might or could have been actually sold for in case the same had not been raised, taken, or carried away by such trustees:—And in case the said justices shall be of opinion that the said materials, before they had been so raised, taken, or carried away, could not have been sold or disposed of, then the said justices shall only assess the damage done to the lands or grounds of the owners or occupiers thereof, by the raising, gathering, or carrying away the same.

Notice to be given to the owner, and his consent, or an order from justices to be obtained.—By *Stat. 3 Geo. 4.*

(a) See the observations upon a similar clause in the Highway Act, ante, p. 154.

c. 126. s. 98, It shall not be lawful for any surveyor, or any other person or persons acting under the authority of this Act, to dig, gather, get, take, or carry away any materials for making or repairing any turnpike road, or for other such purpose or purposes as aforesaid, out of or from any inclosed land or ground, *until notice in writing*, signed by the surveyor, shall have been given to the owner or owners of the premises from which such materials are intended to be taken, or his or her known agent, or to the occupiers of the premises from which such materials are intended to be taken, or left at the house or last or usual place of abode of such owner or occupier, to appear before any two or more justices of the peace acting for the county where the lands from whence such materials are intended to be taken, shall lie, to show cause why such materials should not be had therefrom; and in case such owner, agent, or occupier shall attend pursuant to such notice, but shall not show sufficient cause to the contrary, such justices shall, if they think proper, authorize such surveyor or other person to dig, get, gather, take, and carry away such materials, at such time or times as to such justices shall seem proper; and if such owner, agent, or occupier shall neglect or refuse to appear by himself or herself, or his or their agent, the said justices shall and may (upon proof on oath of the service of such notice, and which oath they are hereby empowered to administer) make such order therein as they shall think fit, as fully and effectually to all intents and purposes, as if such owner or occupier, or his or her agent had attended.

Pits and holes to be filled up or fenced off.—By Sect. 99, If any surveyor of any turnpike road, or any person employed by him, shall, by reason of the searching

for, digging, or getting any gravel, sand, stones, chalk, clay, or other materials for repairing any highways, make or cause to be made, any pit or hole in any common or other lands or grounds, rivers or brooks, as aforesaid, wherein such materials shall be found, the said surveyor or other person shall forthwith cause the same to be sufficiently fenced off, and such fence supported and repaired during such time as the said pit or hole shall continue open; and shall within three days after such pit or hole shall be opened or made, where no gravel, stones, or materials shall be found, cause the same forthwith to be filled up, levelled, and covered with the turf or clod which was dug out of the same; and where any such materials shall be found, within fourteen days after having dug up sufficient materials in such pit or hole, if the same is not likely to be further useful, cause the same to be filled up, sloped down, or fenced off, and so continued; and if the same is likely to be further useful, the said surveyor or other person shall secure the same by posts and rails or other fences, to prevent accidents to persons or cattle:—And in case such surveyor or other person shall neglect to fill up, slope down, or fence off such pit or hole in manner and within the time aforesaid, he shall forfeit the sum of twenty shillings for every such default; and in case such surveyor or other person shall neglect to fence off such pit or hole, or to slope down the same as hereinbefore directed, for the space of six days after he shall have received notice for either of those purposes from any justice of the peace, or from the owner or occupier of such several ground, river, or brook, or any person having right of common within such common or waste lands as aforesaid, and such neglect and notice shall be proved upon oath before one or more of the said justices of the peace, such surveyor shall forfeit and pay

any sum not exceeding £10 nor less than 40s. for every such neglect, to be determined and adjudged by such justice or justices, and to be laid out and applied in the fencing off, filling up, or sloping down such pit or hole, in such manner as the said justice or justices shall direct and appoint; which forfeiture, in case the same be not forthwith paid, shall be levied as other forfeitures are hereinafter directed to be levied (a).

Power to trustees to purchase land, whereout to get materials.—By Sect. 100, It shall be lawful for the said trustees to contract and agree with any person or persons whomsoever, for the purchase or demise from him, her, or them of, and to hold any land or ground, for the purpose of digging stones, gravel, and materials therefrom for the repair and use of the said road; and at any time afterwards to sell the land or ground so purchased, by public auction or tender:—Provided that the entering into any such contract or agreement as last aforesaid, shall not be compulsory against any person or persons unwilling to enter into the same.

Penalty on taking away materials before surveyor has discontinued digging for them.—By Sect. 101, If any person or persons shall take away any materials which shall have been gotten, dug, or gathered for the repair or use of any turnpike road, or any materials out of any quarry which shall have been made, dug, or opened for the purpose of getting materials for any turnpike road, before the surveyor of such road and the workmen employed for getting such materials shall have discontinued

(a) By s. 141. See post, Chapter VI. Section III.

working therein for the space of six weeks, (except the owner or occupier of any private grounds, and persons authorized by such owner or occupier to get materials in such quarry for his own private use, and not for sale,) every person so offending shall, for every such offence, forfeit and pay any sum not exceeding £5.

Power to purchase repositories for materials.—By Sect. 102, The trustees of every turnpike road are hereby empowered to purchase or rent any piece or pieces of land or ground, not exceeding in any one place six yards square, on the sides of such road, as repositories for stone, gravel, and other materials for making or repairing the same:—And in case any difference shall arise between such trustees and the owner of such land or ground, with respect to the value thereof, or the necessity or propriety of taking such land or ground, the same shall be settled and determined by any two of his Majesty's justices of the peace acting for the county where the said land or ground shall be situated, in manner hereinbefore directed with respect to getting materials for the repair of any turnpike road.

Repository for materials within ten miles of the Royal Exchange.—By Stat. 4 Geo. 4. c. 95. s. 56, It shall be lawful for the trustees of any turnpike road, and they are hereby empowered to purchase or rent, with the consent of the owner or proprietor thereof, any piece or pieces of ground, within ten miles of the Royal Exchange, as a repository for materials, such piece or pieces of ground to be of such extent as they may think proper, so as the same shall not exceed in the whole half an acre.

Proviso for the reduction of toll on materials by canal or rail-road companies.—By Stat. 3 Geo. 4. c. 126. s. 103,

It shall be lawful for the company of proprietors, or the trustee or trustees for the proprietors of any canal, or of any railway or tram-road, on which any flint, gravel, stone, or other materials for the repair of any turnpike road shall or may be conveyed, and they are hereby authorized and empowered to lessen and reduce the tolls and rates imposed by any Act of Parliament, by which any such company shall be appointed, or any other Act whatsoever, on the carriage of such flint, gravel, stone, or other materials, carried on the said canal or railway, and to appoint such lower tolls and rates to be taken for the carriage and conveyance of the same, as the said company or trustees shall think proper; and all such reduced tolls shall and may be collected, taken, and recovered by the same persons and means, and by and under the same powers, provisions, penalties, and forfeitures as the original tolls might have been taken in case the same should not have been reduced; any Act or Acts of Parliament, bye-law, or ordinance, or trust deed, to the contrary notwithstanding.

THIRDLY: *As to the repair by statute labour:—And by prescription.*

I. Statute labour and composition for the same.

Regulations as to statute labour.—By Stat. 4 Geo. 4. c. 95. s. 80, All persons who by law are or shall be liable to do statute work, or are or shall be chargeable towards the repairing and amending any turnpike road, shall be and remain liable thereto, in like manner in every respect as they now are, or have heretofore been:—And it shall be lawful for any two or more justices of the peace in

and for the county, city, or place in which any such turnpike road shall lie or be situate, and they are hereby required and empowered upon application made to them by any three or more of the trustees of such turnpike road, or by their clerk or surveyor, yearly to adjudge and determine what part or proportion of the statute work shall every year be done upon such road by the inhabitants of the respective parishes, hamlets, and places, in or through which the said road doth or shall lie, lead, or pass, and also what proportion of the money received by the surveyor or surveyors of the highways of every such parish, hamlet, or place, in lieu of or as a composition for such statute work as aforesaid (*a*) shall be by him, her, or them, paid to the said trustees, or their treasurer or treasurers:—And in order thereunto, the surveyor or surveyors of the highways for every such parish, hamlet, or place, shall, on an order in writing (*b*) made by the said justices, on an application to them by the trustees of the turnpike road, or any three or more of them, or by their clerk or surveyor, and respectively delivered to such surveyor or surveyors of the highways, or left at his or their last or usual place of abode, bring and deliver, within ten days afterwards, to the said turnpike surveyor, or to his place of abode, true and perfect lists in writing (*c*), of the names of the several persons who, within such parish, hamlet, or place, are by law subject and liable to do statute work for that year, or to the payment of any money in lieu of or as a composition for such statute work, distinguishing the nature of the work to be

(*a*) See ante, p. 137, et seq. as to the regulations with respect to the composition for statute work upon highways in general.

(*b*) See Form, Appendix, No. LXXII.

(*c*) See Form, Appendix, No. LXXXVIII.

done, whether with teams, or draughts, or otherwise, and also the amount of the respective sums to be paid ; which lists of names shall be made in such manner and under such regulations and restrictions as are or may be directed by any law or statute in force or effect for the repairs of the public highways, and may be made in the form specified in the Schedule to this Act:—And the said turnpike surveyor, having received such lists, shall within fourteen days afterwards give a notice (*a*) to the surveyor or surveyors of the highways, of the time when such lists will be laid before the said justices, in order to apportion the said statute duty:—And at the time appointed in and by such notice the said lists shall be laid before the said justices by the said turnpike surveyor, in the presence of the said surveyor of the highways (if he shall attend), and out of such lists the said justices shall and may allot, appoint, and order (*b*) such and so many of the persons, who shall appear to be subject and liable to do statute work in every year upon such road, as the said justices shall think reasonable, and the same shall be done on such days, and at such time (not being hay-time or harvest), and on such parts of the said road, as the said trustees, or their surveyor or surveyors, shall from time to time order, direct, or appoint:—And the said justices shall and may order (*b*) and direct the surveyor or surveyors of such parishes, hamlets, and places respectively, to pay over to the said trustees, or their treasurer, or other person duly authorized to receive the same, such proportion of the composition-money for statute work as aforesaid, as they the said justices shall think proper,

(*a*) See Form, Appendix, No. LXXIII.

(*b*) See Form, Appendix, No. LXXIV.

and at such time or times as the said justices shall direct: And every person who shall neglect or refuse to do such statute work as aforesaid, after notice in writing given to or left for him, her, or them at his, her, or their last, or usual place of abode or places of abode for that purpose, by any surveyor to the said trustees, shall, for every day of his, her, or their default, or the default of any labourer or labourers, team or teams, draught or draughts, horse or horses, beast or beasts, to be provided by him, her, or them, be subject and liable to such fines, penalties, and forfeitures as such person or persons may be subject or liable by any law or statute now in force or effect for repair of the public highways:—And if any person who shall come to work as a labourer, or shall be sent with any team or draught to work on any part of such road, shall be found idle or negligent by any surveyor to the said trustees, such surveyor is hereby empowered to remove and dismiss the person who shall be found idle or negligent as aforesaid; and in that case every such person shall be subject and liable to the respective forfeitures and payments as aforesaid, as if he had neglected or refused to come, or such team or draught had not been sent to work on any part of such road:—All which forfeitures shall be paid to the treasurer to the said trustees, and applied towards amending the said road:—And in case the surveyor or surveyors for the highways for any of the said parishes, hamlets, or places, shall refuse or wilfully neglect to give in any such lists as aforesaid, or shall knowingly or wilfully give in false and imperfect lists, or shall refuse or neglect to collect or pay over such composition-money, or any part thereof, in manner aforesaid, every such surveyor so offending shall, for every such offence, forfeit and pay any sum not exceeding £10; and such composition-money shall and may be recovered from

such surveyor or surveyors of the highways, by distress and sale of his or their goods and chattels, by warrant under the hands and seals of any two justices of the peace for the county, city, or place where any such road shall lie or be situate.

Where no highway surveyor shall be appointed, how lists of persons liable to statute duty shall be made out.— By Section 81, Where any turnpike road shall pass through any parish, township, or place, liable to the repair of the roads within the same, but for which no surveyor of the highways shall be appointed, then and in every such case the churchwardens and overseers of the poor of such parishes, townships, and places respectively, and in cases where neither surveyor, churchwardens, or overseers of the poor shall be appointed, then such other inhabitant or inhabitants of such parish, township, or place, as shall be thereto required by an order in writing made by the justices, on application to them by the trustees of the turnpike road, or by their clerk or surveyor, and respectively delivered to such churchwardens or overseers, or inhabitant or inhabitants, or left at his or their last or usual place of abode, shall deliver or cause to be delivered within ten days afterwards to the said turnpike surveyor, or to his place of abode, true and perfect lists in writing of the names of the several persons who within such parish, township, or place, are by law subject and liable to do statute work for that year, or to the payment of any money in lieu of or as a composition for such statute work, distinguishing the nature of the work to be done, whether with teams or draughts, or otherwise, and also the amount of the respective sums to be paid; which lists shall be made and used, and dealt with in the manner

directed by the said recited Act (a) and this Act; and the statute work shall be ordered and adjudged by the justices, and enforced and required or compounded for, in the same way as if the said lists had been made and delivered by the surveyor of the highways under the provisions and authorities of the said recited Act and this Act.

Power to justices to transfer the statute labour from turnpike roads to other highways.—By Stat. 3 Geo. 4. c. 126. s. 109, After reciting that there are or may be turnpike roads in such a state and condition with regard to their repairs and the revenues arising upon them, that the statute duty required to be performed upon the same may be in the whole or in part dispensed with, and employed more advantageously for the benefit of the other public highways within the parish, township, or place liable to the performance of such duty;—It is enacted, that it shall be lawful for the justices of the peace at any Special Sessions, upon application to them made by the surveyor of the highways, or by any two inhabitants of any parish, township or place, to summon before them the clerk and surveyor of any turnpike road, within such parish, township, or place alleged to be in the situation before described, and then and there to produce before them a state of the revenues and debts of such turnpike road, and for such justices to inquire into the state and condition of the repairs thereof, and also of the repairs of such other highways:—And if it shall appear to the said justices, upon full and clear evidence that the whole or any part of such statute duty may be conveniently dispensed with from such turnpike road, without endanger-

(a) 3 Geo. 4. c. 126.

ing the securities for the monies advanced upon the credit of the tolls thereof, and that such statute duty is wanted for the repairs of the other highways within such parish, township, or place, then and in that case it shall be lawful for the said justices to order (a) the whole or part of such statute duty to be performed upon the highways, not being turnpike, within such parish, township, or place, under the direction of the surveyor thereof, during such time as to them shall seem reasonable; and the same shall be performed accordingly.

Power to trustees to compound for statute duty.—By Stat. 3 Geo. 4. c. 126. s. 105, It shall be lawful for the trustees of every turnpike road to compound and agree with any person, bodies politic or corporate, for the repairs of statute work to be by him, her, or them done on any such turnpike road, and also with the surveyor or surveyors of the highways for any of the parishes, hamlets, or places in which the said road doth or shall lie and be situate, for a certain sum of money, by the year or otherwise, as the said trustees shall think reasonable, in lieu of the whole or any part of the statute work or other work to be by all or any of the said inhabitants and occupiers done on the said road; and all such composition-money shall be applied for the purposes of such turnpike road:—And every such surveyor of the highways, who shall pay any such composition-money, shall be reimbursed the same, in like manner as surveyors of the highways are by the laws in being to be reimbursed the money by them laid out and expended in buying materials for the repairing of any other highway or highways.

(a) See Form of the Order and Certificate thereof, Appendix, Nos. LXXV. and LXXVI.

And by *Stat. 4 Geo. 4. c. 95. s. 82*, All composition-money in lieu of statute duty shall be paid by the person or persons compounding to the treasurer of the trustees, at such time or times and in such manner, as shall be agreed upon at the entering into such composition.

II. *Repair by Prescription, &c.*

Lands liable to repair of turnpike roads to continue so.—By *Stat. 7 & 8 Geo. 4. c. 24. s. 17*, It is enacted, That where any part or parts of any turnpike road, or any bridges, arches, drains, or sewers lying in and upon such road, have been accustomed or ought to be repaired and maintained by any particular person, body politic or corporate, by reason of the tenure of any lands, tenements, or hereditaments, or otherwise, or by any county or any parish, or where any composition has been entered into or made in lieu thereof, all and every such part or parts of such road, and all such bridges, arches, drains, and sewers, shall from time to time be maintained and kept in repair by such person, body politic and corporate, county or parish, or such composition shall be paid, in such manner as the same were respectively maintained and kept in repair, or paid, before the passing the said recited Acts (a), or of any local Act for making or maintaining any turnpike road.

Power to trustees to contract with persons liable by prescription.—By *Stat. 3 Geo. 4. c. 126. s. 106*, It shall be lawful for the trustees of any turnpike roads to contract and agree (b) with any person or persons liable to

(a) 3 Geo. 4. c. 126.—and 4 Geo. 4. c. 95.

(b) See Form of Agreement, Appendix, No. LXXI.

the repair of any part of the road under the care and management of such trustees, or of any bridges thereon, by tenure or otherwise, for the repair thereof, for such term as they shall think proper, not exceeding three years; and to contribute towards the repair of such road or bridges such sums or sums of money as they shall think proper, out of the tolls arising on such turnpike road.

Power to trustees to contract with parishes liable to the repair of bridges (a).—By Sect. 108, It shall be lawful for the trustees of any turnpike road, and for such parish or parishes (b), in like manner to enter into a composition or agreement with each other, and by the authority of the persons at present legally competent to make rates for such parish or parishes, whereby in consideration of such sum or sums of money as shall be agreed upon being yearly paid to the treasurer of the trustees entering into such composition or agreement, out of the rates to be raised for the repair of the bridge or bridges the subject thereof, the repairs of any such bridge shall, during the continuance of any Act or Acts of Parliament under which such trustees shall be appointed or act, be undertaken and carried on by the said trustees; And all rates and assessments, raised and levied for carrying such composition or agreement into effect, shall in like manner be good and valid to all intents and purposes whatsoever.

(a) Section 107 empowers counties to contract with inferior districts, who may be liable to the repair of bridges situated upon turnpike roads. See post, Sec-

tion III. of this Chapter.

(b) Such parishes as may be liable to repair bridges situated upon turnpike roads.

FOURTHLY: *As to the regulations for the Exaction of Toll.*

THE imposition of toll, to be applied to the maintenance of the road, is the revival of an old principle, but with some difference in its adaptation to practice. Under the ancient system of tenures, the lord of the soil frequently claimed the privilege of receiving toll from all who travelled along his highway;—nor was this esteemed a mere bounty, for he was liable, in consideration of such toll, to keep the way in good order; and in some countries, even to defend the passengers from depredation. There was an instance in France, where the lord was fined, for permitting a merchant to be robbed upon his highway.

The amount of toll to be paid on the several roads is always regulated by the provisions of the local Act which applies to each particular Trust. But under this and the two following heads will be arranged all the provisions upon this subject, which are contained in the General Turnpike Acts.

Power to collect tolls.—By *Stat. 9 Geo. 4. c. 77. s. 16*, It is enacted, That it shall be lawful for the trustees of any turnpike road, or any person appointed or continued to be appointed collector of the tolls to be taken by virtue of any local Turnpike Act, to demand and take every day, (such day, for the purposes of all local Turnpike Acts, being computed from twelve of the clock at night to twelve of the clock of the next succeeding night,) the several and respective tolls to be mentioned in any such Act, at the several and respective toll-gates and turnpikes, or side bars and chains, which are or shall be continued or erected by virtue of this Act, or of any local Turnpike Act, in, upon, across, or on the sides of any turnpike

road, or any part or parts thereof; and which tolls or sums of money shall be demanded and taken as aforesaid, before any horse, cattle, or carriage whatsoever shall be permitted to pass through any toll-gate or turnpike, or side bar or chain:—And the tolls or sums of money, to be levied and collected by virtue of any local Turnpike Act, shall be and the same are hereby vested in the trustees of such Act for the purposes thereof, in manner to be thereby directed.

Tolls to be paid upon carriages affixed to others.—By Stat. 3 Geo. 4. c. 126. s. 31, After reciting, That coaches, chariots, chaises, chairs, carts, and other carriages, sometimes pass through turnpike gates affixed, tied, or secured to waggons or carts, and horses are sometimes sent under the charge of the drivers of such waggons and carts, and are fastened thereto; and that it is expedient to determine what tolls such coaches, chariots, chaises, chairs, carts, and other carriages, and horses, ought to pay on passing through such gates;—It is enacted, That where by any Act for repairing any turnpike road no toll is directed to be taken for or in respect of any coach, chariot, chaise, or any other carriage whatsoever, with four wheels, passing through any turnpike-gate on such road, affixed, tied, or secured to any waggon or cart, the same toll and no more shall be demanded and taken for and in respect of such coach, chariot, chaise, or other carriage, as if the same had passed through drawn by two horses; and where by any Act for repairing any turnpike road no toll is directed to be taken for or in respect of any chair, cart, or other carriage whatsoever, with two wheels only, passing through any turnpike-gate on such road, so affixed, tied, or secured to any waggon or cart as aforesaid, the same toll and no more shall be demanded and taken for

and in respect of such chair, cart, or other carriage with two wheels only, as if the same had passed through drawn by one horse only; and where any horse shall be fastened to, but not used in drawing any waggon, cart, or other carriage, such horse shall not be liable to a higher toll than a single horse:—Provided that if any coach, chariot, chaise, chair, or other carriage so affixed, tied, or secured to any waggon or cart, shall have any goods conveyed therein, other than the harness thereto belonging and such articles of package as may be necessary for the protection of such carriages, the same shall be liable to double the toll hereby imposed.

Two oxen to be considered as one horse.—By Sect. 38, In all carriages wherein oxen or neat cattle shall be used, two oxen or neat cattle shall be considered as one horse, for all the purposes mentioned in this Act, or any particular Turnpike Act, with respect to tolls or other things.

Power to reduce tolls.—By Statute 3 Geo. 4. c. 126. s. 43, It shall be lawful for the trustees appointed in and by virtue of any Act of Parliament for the repairing and amending any turnpike roads, in case no power or effectual power should be given to them under the Act by which they are appointed, and they are hereby empowered, at a meeting to be held for that purpose, (of which one calendar month's notice shall be given in writing, to be affixed on all turnpike-gates which shall be then erected upon such roads, and in some public newspapers circulated in that part of the country,) from time to time to lessen and reduce (a) all or any of the tolls granted by any of the said respective Acts, for and during such time

(a) See Form of Order, Appendix, No. LXX.

as the said trustees shall think proper; and afterwards, at any meeting to be held as aforesaid, from time to time, as they shall see occasion, to advance all or any of the tolls so lessened to any sum or sums of money not exceeding the said rates granted by such Acts of Parliament and this Act respectively:—Provided nevertheless, that where the whole money borrowed on the credit of the tolls granted by any such Act shall not have been paid and discharged, no such tolls shall be lessened or reduced without the consent of the person or persons entitled to five-sixths of the money remaining due upon such respective tolls.

And by *Section 44*, In all cases where the trustees of any turnpike road shall reduce or advance the tolls on the road or roads for which they shall act, such reduction or advance shall be made as to waggons, carts, and other carriages, the breadth of the wheels whereof is regulated by this Act, with reference to the proportion or scale of tolls payable on such waggons, carts, or other carriages, according to the breadth of the wheels thereof; (that is to say), the trustees making the reduction or advance, shall reduce or advance the toll payable on the waggons, carts, or other such carriages, having the fellies of the wheels thereof of the breadth of six inches, and shall then take and demand double or other proportions (as the case may be) of such reduced or advanced tolls on waggons, carts, or other carriages having the fellies of the wheels thereof of a greater or less breadth than six inches; and the reduction or advance of the proportion of toll to be payable by this or any other Act in respect of the breadth of wheels, or any other reduction or advance of tolls, to be made in any other way than in manner aforesaid, shall be null and void to all intents and purposes whatsoever.

Trustees may compound for tolls.—By *Stat. 4 Geo. 4. c. 95. s. 13*, The trustees of every turnpike road may, and they are hereby empowered from time to time, as they shall see convenient, to compound and agree, for any term not exceeding one year at any one time, with any person or persons, for the tolls payable for any horses, cattle, or beasts, or carriages passing through any of the turnpikes or toll-gates of the road under their care and management, and collected and taken under the authority of the particular Act or Acts, in execution of which the trustees making such composition shall act, or of the recited Act or this Act (a).

Power to continue, or erect, or discontinue toll-gates.—By *Stat. 9 Geo. 4. c. 77. s. 5*, It shall be lawful for the trustees of any turnpike road, and they are hereby authorized and empowered, to continue all and every or any of the toll-gates or toll-houses now standing or being in, upon, or across any such turnpike road, or on the sides thereof:—And from time to time, at any special meeting to be holden for that purpose, of which meeting public notice (b), specifying the time and place and the purpose thereof, shall have been given in some newspaper published or circulated in the county or counties through which any such turnpike road passes, and also by affixing a copy of such notice on all the turnpikes, toll-gates, or side-bars (if any) which shall be then standing on such road, fourteen days previously to such meeting, to order and direct, by some order in writing (c), to be signed by three at least of the trustees present at such meeting, that there be erected and built in, upon, or across any such

(a) But by 3 Geo. 4. c. 126. s. 19, trustees are prohibited from compounding for the tolls charged for over-weight.

(b) See Form, Appendix, No. LXVII.

(c) See Form, Appendix, No. LXVIII.

turnpike road, or any part thereof, or upon the sides thereof, or any part thereof, when and where they shall judge necessary, such and so many toll-gates, turnpikes, side-bars, and chains, with toll-houses, out-houses, and other conveniences thereto, and also to take in and inclose on the sides of such road, or any part thereof, suitable garden spots for each of such toll-houses, not exceeding one-eighth of a statute acre to each toll-house, as the said trustees shall direct or appoint:—And also shall and may, from time to time, at any such meeting, or at any other meeting to be called as aforesaid, and by such order as aforesaid, from time to time order and direct any of such toll-gates, turnpikes, side-bars, and chains to be taken down and discontinued, or to be removed and placed elsewhere, upon, across, or on the sides of such road, in such situations as to them the said trustees may appear fit or eligible:—Provided that nothing in this Act contained shall authorize any toll-gate, turnpike, side-bar, or chain to be erected or built in any place or places where it is or may be provided by any local Turnpike Act, there shall be no turnpike, toll-gate, side-bar, or chain erected, built, or placed.

Justices may order the removal of unauthorized toll-gates.—By Stat. 3 Geo. 4. c. 126. s. 46, If the trustees appointed to put any Act made for the repair of any turnpike road into execution, shall exceed their power by erecting or continuing any gate or gates, turnpike or turnpikes, where they have not any power, by virtue of any Act of Parliament, to erect such gate or gates, turnpike, or turnpikes, it shall be lawful for the justices of the peace, for the limit where any such gate or gates, turnpike or turnpikes, is or shall be erected or continued, in their General Quarter Session assembled, upon

complaint of such excess of power in such trustees, in a summary way to hear and determine whether such power has been exceeded, and if such power has been exceeded, to order the sheriff of the county, who is hereby authorized and required to execute such order, to remove any such gate or gates, turnpike or turnpikes.

Lamps to be lighted on toll-houses.—By Stat. 7 & 8 Geo. 4. c. 24. s. 6, It shall be lawful for the trustees to order and direct one or more lamp or lamps to be placed and erected on or against or in front of each and every of the toll-houses on the road; and also to order and direct at what times of the year, and during what hours such lamp or lamps, or any of them shall be kept lighted: And all and every the collector and collectors of the tolls on such road, and also all and every the lessee or lessees thereof, who shall neglect or omit to observe and fulfil the order of the said trustees in respect to the keeping and lighting of such lamp or lamps, shall forfeit and pay any sum not exceeding 20s. for every such neglect or omission:—And in case any person shall damage or injure any lamp or lamps to be placed and set up as aforesaid, or extinguish the lights therein, such person shall forfeit and pay any sum not exceeding 40s. for every such offence.

Table of tolls, and tickets.—By Stat. 4 Geo. 4. c. 95. s. 28, The trustees for making or maintaining any turnpike road shall, and they are hereby required to put up, or cause to be put up, and afterwards to be continued, at every toll-gate within their respective districts, a table, painted in distinct and legible black letters on a board with a white ground, containing at the top thereof the name of the gate at which the same shall be put up,

and also a list of all the tolls payable at every such gate, distinguishing severally the total amount of tolls payable under any particular Act or Acts, and this and the said recited Act (a), and the different sorts of carriages for which they are to be paid, where there shall be any variation therein, and also a list of the several gates which shall be wholly or partially cleared by the payment of the toll at the toll-gate or bar where such table of tolls shall be affixed:—And the said trustees shall also provide tickets denoting the payment of toll, and on such several tickets shall be specified the name of the gate at which the same respectively shall be delivered, and also the names of the several gates freed by such payment, one of which tickets shall be delivered, *gratis*, to the person paying the toll; and on the production of such ticket at any gate or gates therein mentioned, as being cleared as aforesaid, by the payment of the toll at the gate where such ticket was delivered, the person producing the same shall pass through the gate or gates therein mentioned, without paying any further or additional toll.

Recovery of toll by distress.—By Stat. 3 Geo. 4. c. 126. s. 39, If any person, subject or liable to the payment of any of the toll or tolls under and by virtue of this or any other Act of Parliament for making, repairing, or maintaining any turnpike road, shall, after demand thereof made, neglect or refuse to pay the same or any part or parts thereof, it shall be lawful for the person or persons authorized or appointed to collect such tolls, by himself or themselves, or taking such assistance as he or they shall think necessary, to seize and distrain any

(a) 3 Geo. 4. c. 126.

horse, beast, cattle, carriage, or other thing, upon or in respect of which any such toll is imposed, together with their respective bridles, saddles, gears, harness, or accoutrements (except the bridle or reins of any horse or other beast, separate from the horse or beast), or any carriage in respect of the horses or cattle drawing the carriage on which such toll is imposed, or any of the goods or chattels of the person or persons so neglecting or refusing to pay; and if the toll or any part thereof, so neglected or refused to be paid, and the reasonable charges of such seizure and distress, shall not be paid within the space of four days next after such seizure and distress made, the person or persons so seizing and distraining may sell the horse, beast, cattle, carriages, or things so seized and distrained, or a sufficient part thereof, returning the overplus of the money to arise by such sale (if any), and what shall remain unsold, upon demand, to the owner thereof, after such tolls, and the reasonable charges occasioned by such seizure, distress, and sale, shall be deducted (a).

Justices may settle disputes concerning the exaction of toll.—By Section 40, If any dispute shall happen or arise about the amount of the tolls due, or the charges of making, keeping, or selling any distress made for non-payment of any tolls, it shall be lawful for the collector, or the person distraining, to retain such distress, or the money arising from the sale thereof (as the case may be), until the amount of the tolls due and the charges of the making, keeping, and selling the distress,

(a) See *Peacock v. Harris*, 10 East, 104, as to the *prima facie* title of the collector to recover,

although he may have been irregularly appointed.

be ascertained by some justice of the peace for the county, division, or place wherein the turnpike or toll-gate, at which the toll in dispute shall be payable, shall or may be situate, who, upon application made to him for that purpose, shall examine the matter on the oath of the parties or other witness or witnesses (which oath such justice is hereby authorized and empowered to administer), and shall determine the amount of the tolls due, and shall award such costs and charges to either party as to the said justice shall appear right and proper:—All which costs and charges shall and may be levied and recovered, in case of non-payment thereof forthwith, by distress and sale of the goods and chattels of the person or persons so awarded or directed to pay the same, by warrant under the hand and seal of such justice, rendering the overplus (if any), upon demand, after deducting the costs and charges of making such distress and sale, to the person or persons whose goods and chattels shall have been so distrained and sold.

Penalty for evading the payment of toll.—By Sect. 41, If any person shall, with any horse, cattle, beast, or carriage, go off or pass from any turnpike road, through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier, or servant or one of the family of the owner or occupier of such land or ground), with intent to evade the payment of the tolls granted by any Act of Parliament; or if any owner or occupier of any such land or ground shall knowingly or willingly permit or suffer any person (except as aforesaid), with any horse, cattle, beast, or carriage whatsoever, to go or pass through or over such land or ground, with intent to evade any such tolls; or if any person shall give or

receive from any person other than the collectors of the tolls, or forge, counterfeit, or alter, any note or ticket directed to be given, with intent to evade the payment of the tolls or any part thereof; or if any person shall fraudulently or forcibly pass through any such toll-gate with any horse, cattle, beast, or carriage; or shall leave upon the said road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened; or shall take off, or cause to be taken off, any horse or other beast or cattle from any carriage, either before or after having passed through any toll-gate, or having passed through any toll-gate shall afterwards add or put any horse or other beast to any such carriage, and draw therewith upon any part of any turnpike road, so as to increase the number of horses or other beasts drawing the said carriage, after the same shall have passed through any toll-gate, whereby the payment of all or any of the tolls shall or may be evaded; or if any person shall do any other act whatever, in order or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall, for every such offence, forfeit any sum not exceeding £5.

Regulations for letting to farm the tolls.—By Stat. 3 Geo. 4. c. 126. s. 55, It shall be lawful for the trustees of every turnpike road, at a public meeting, to let to farm the tolls of the several gates erected upon their respective turnpike roads, in the manner hereinafter mentioned, although no express power shall have been given by any Act or Acts for that purpose:—And whenever any tolls shall hereafter be let to farm by virtue of the powers given by this or any other Act or Acts for that purpose, the following directions shall be observed;

(that is to say), the trustees shall cause notice (a) to be given of the time and place for letting the same, at least one month before the day to be appointed for that purpose, by affixing the same upon every toll-gate belonging to such turnpike road, and also by insertion thereof in some public newspaper circulated in that part of the country, and specifying in every such notice the sum which the said tolls produced in the preceding year, clear of the salary for collecting the same, in case any hired collector was appointed, and that they will let such tolls by auction to the best bidder, on his producing sufficient sureties for payment of the money monthly, or otherwise (as in such notice shall be specified), and that they will be put up at the sum which they were let for or produced in the preceding year, clear of the salary of the collector:—And to prevent fraud or any undue preference in the letting thereof, the trustees are hereby required to provide a glass, with so much sand in it as will run from one end of it to the other in one minute, which glass, at the time of letting such tolls, shall be set upon a table, and immediately after every bidding, the glass shall be turned, and, as soon as the sand is run out, it shall be turned again, and so for three times, unless some other bidding intervenes; and if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls, and shall forthwith enter into a proper agreement for the taking thereof, and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees shall think fit:—And if the person being the last bidder shall not forthwith enter into such agreement, it shall be lawful to put

(a) See Form, Appendix, No. LXIX.

up the said tolls again immediately for another bidder, and in like manner to continue putting up the same, until a bidder shall be found who shall enter into such agreement:—And in case no bidder shall offer, or in case the same shall not be let at such auction, it shall be lawful for the said trustees to accept a private tender for the same, and to demise or let to farm, or agree to demise or let to farm, all or any of such tolls, at any sum not less than the sum at or for which they shall then have been last let; or the said trustees may appoint a collector of such tolls, or fix some future day for the letting thereof; as they shall judge most proper, upon giving such notice thereof as aforesaid, and shall and may in that case put them up at such sum as they shall think fit:—And if the person or persons who shall be the farmer or renter, or collector or collectors of such tolls shall take a greater or less toll from any person or persons than what is authorized or directed by this or the particular Turnpike Act, he or they shall, for every such offence, forfeit the sum of £5, and the said agreement for renting the tolls shall, if the said trustees shall think fit to vacate the same, become and be null and void (a):—Provided always, that at all such lettings the trustees shall be entitled to bid for the tolls so to be let, either by themselves or their clerk or treasurer, or any other person by them authorized:—Provided also that no such tolls shall be demised or leased for any longer term than three years at any one time.

Though the forms of the Act have not been strictly complied with, and the renter is illegally appointed, he

(a) See ante, p. 225, as to proceedings against collectors for extortion. By 4 Geo. 4. c. 95. s. 30.

the penalty is any sum not exceeding £5.

may yet recover, on an account stated, tolls for which he has given credit; no objection being made by the trustees, and the party to whom the credit was given, having by his own acts acknowledged the state of the account (a).

By *Stat. 4 Geo. 4. c. 95. s. 52*, It shall be lawful for the trustees of any turnpike road, under and subject to the directions and provisions of *Stat. 3 Geo. 4. c. 126*, and this Act, to let to farm, or agree to let to farm, all or any part of the tolls of the several gates erected upon their respective roads, and all or any of the said gates, either together and in one lot, or by parcels and in several lots; and in case the said trustees shall at any time let to farm the said tolls in parcels or lots, it shall be lawful for the said trustees to put up each such parcel or lot at such sum as they shall think fit.

By *Section 53*, When the trustees of any turnpike road shall put up the tolls to let to farm, the said trustees may, if they think fit, appoint some person to bid for the same on their account, to the intent that such tolls may not be let for less than an adequate value.

By *Section 54*, After reciting, that in some situations a toll-gate or bar, belonging to trustees of one road, is placed so near to the gate or bar of the trustees of another road as to be inconvenient to the respective trusts and to the public; It is enacted, that it shall be lawful for the trustees of any turnpike road, if they shall agree thereto at any public meeting to be holden for that purpose, to take to farm the tolls payable at any toll-gate

(a) *Peacock v. Harris*, 10 East, 104.

or bar of any other road adjoining or near to the road under their care and management; and the trustees so farming the tolls may collect and receive the same, or may reduce the said tolls so farmed, or may discontinue the same, as they shall see fit.

By *Stat. 3 Geo. 4. c. 126. s. 57*, All contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees letting such tolls, or any two or more of them, or by their clerk or treasurer, and the lessee or farmer, and his sureties, of such tolls respectively, shall be good, valid, and effectual to all intents and purposes, notwithstanding the same may not be by deed or under seal.

By *Section 58*, During such time as the tolls or any part or parts thereof shall be leased to any person or person whomsoever, it shall be lawful for the lessee or lessees, farmer or farmers thereof, or such other person or persons as he, she, or they shall, by writing or writings under his, her, their hand or hands, authorize or appoint, to demand and take such tolls so leased, demised, or farmed, and to use all such means and methods for the recovery thereof in case of non-payment or evasion, as any collector of such tolls appointed under or by virtue of any Act of Parliament for the making of turnpike roads, or by this Act, is authorized and empowered to use:—And such lessee or lessees, farmer or farmer, or other person or persons as aforesaid, so demanding and taking such tolls, shall be subject to the like pains, penalties and forfeitures, and shall be liable to the like actions and prosecutions, as any collector of such tolls appointed by the trustees is subject or liable to.

FIFTHLY: *As to extra tolls in respect of narrow wheels, and over-weight.*

I. Regulations as to the breadth of the wheels of carriages.

By *Stat.* 3 Geo. 4. c. 126. s. 7, It is enacted, That from and after the 1st of January, 1823, the trustees appointed by virtue and under the authority of any Act made or to be made for making or maintaining any turnpike road, shall and they are hereby required to demand and take, or cause to be demanded and taken, for every waggon, wain, cart, or other such carriage, having the fellies of the wheels thereof of less breadth than $4\frac{1}{2}$ inches at the bottom or soles thereof, or for the horse or horses or cattle drawing the same, one-half more than tolls which are or shall be payable for any carriage of the same description, having the wheels thereof of the breadth of six inches; and for every waggon, wain, cart, or other such carriage, having the fellies of the wheels thereof of the breadth of $4\frac{1}{2}$ inches, and less than six inches at the bottom or soles thereof, or for the horse or horses or other cattle drawing the same, one-fourth more than the tolls or duties which are or shall be payable on any carriage of the like description, having the wheels thereof of the breadth of six inches, by any Act now in force, or hereafter to be passed, for making or maintaining any turnpike road, before any such waggon, wain, cart, or other carriage respectively, shall be permitted to pass through any turnpike-gate or gates, bar or bars, where tolls shall be payable by virtue of any such Acts.

By *Section 9*, Where any waggon or cart shall have the sole or bottom of the wheels thereof rolling on a flat

surface, and the nails of the tire of such wheels counter-sunk and be (*a*) cylindrical, (that is to say,) of the same diameter on the inside next the carriage as on the outside, so that when such wheels shall be rolling on a flat or level surface, the whole breadth thereof shall bear equally on such flat or level surface, and shall have the opposite ends of the axle-trees of such waggon, cart, or other carriage, so far as the same shall be inserted into the respective naves of the wheels thereof, horizontal, and in the continuance of one straight line, without forming any angle with each other, and in each pair of wheels belonging to such carriage, the lower parts, when resting on the ground, shall be at the same distance from each other as the upper parts of such wheels, it shall be lawful for the trustees of any turnpike road, at a general meeting, if they shall think fit so to do, to make an order for every such waggon and cart to pass through any toll gate or bar, under the superintendence of the trustees making such order, upon paying only so much of the tolls and duties as shall not be less than two-thirds of the full toll or duty payable by any Turnpike Act, on such waggon; cart, or other carriage, and the horse or horses or cattle drawing the same.

Power to measure wheels; and penalty on drivers refusing.—By Section 11, It shall be lawful for any trustee of any turnpike road, and for every collector or his deputy, or other person acting by or under the authority of the trustees of any turnpike road, or of their lessee of tolls, to measure and examine, or cause to be measured and examined, the breadth and construction of the wheels of every waggon, cart, or other such carriage passing on

such turnpike road; such measurement and examination to take place, if the trustee, or other authorized persons making the same shall so require, previously to such waggon, cart, or other carriage being allowed to pass through any toll-gate or bar at which toll shall be payable: And if any owner or driver of any such waggon, cart, or other carriage, shall turn or drive out of the road, in order to avoid or evade the measuring of the wheels of such waggon, cart, or other carriage, or if any such owner, driver, or any other person, shall refuse to allow the wheels of any such waggon, cart, or other carriage to be measured, and the construction thereof examined, or shall attempt to pass through any toll-gate or bar before such measurement and examination shall be made (the same having being required), or shall in any way hinder or obstruct any such trustee, or other authorized person, in making such measurement and examination, every such owner, driver, or other person so misbehaving shall, for every such offence, forfeit any sum not exceeding £5:—And it shall not be lawful for any such waggon, cart, or other carriage, not permitted to be measured or examined as aforesaid, to pass along any turnpike road: And if any collector or his deputy, or any other person appointed to collect the tolls, shall allow the same to pass before such measurement and examination shall be made (the same having been required), every collector, deputy, or other person shall, for every such offence, forfeit any sum not exceeding £5.

Exemptions from such additional toll.—By Statute 4 Geo. 4. c. 95. s. 19, Nothing in Stat. 3 Geo. 4. c. 126. or this Act contained, relating to the breadth of the wheels of carriages, or to the regulations of weight, or to the tolls payable in respect of the wheels, or of the

weight of carriages, shall extend or be construed to extend to any chaise marine, coach, landau, berlin, barouche, phaeton, sociable, chariot, calash, hearse, break, chaise, curricule, gig, chair, or taxed cart, or any cart not drawn by more than one horse or two oxen.

As to the scale of tolls under prior enactments, or local Acts.—By *Stat. 4 Geo. 4. c. 95. s. 5*, It is enacted, That where the trustees of any turnpike road shall not, previously to the passing of *Stat. 3 Geo. 4. c. 126*, have taken and collected, on the road under their care and management, the additional tolls on waggons, wains, carts, or carriages, having the wheels thereof of less breadth or gauge than six inches from side to side at the bottom or sole thereof, and on the horses or beasts of draught drawing the same, directed to be taken and collected by *Stat. 13 Geo. 3. c. 84*, and the particular or local Act or Acts of Parliament, in execution whereof the said trustees shall act, shall not have provided a scale of tolls applicable to the road under their care and management, such trustees shall, from and after the 1st day of January, 1824, continue to take, collect, and receive, for every waggon, wain, cart, or other such carriage, having the fellies of the wheels thereof of less breadth or gauge than $4\frac{1}{4}$ inches from side to side at the bottom or sole thereof, or for the horses or beasts of draught drawing the same, the same tolls as are in and by such particular or local Act or Acts payable in respect of such waggons, wains, carts, or other such carriages; and for every waggon, wain, cart, or other such carriage, having the fellies of the wheels thereof of the breadth or gauge of $4\frac{1}{4}$ inches, and less than six inches at the bottom or soles thereof, or for the horses or beasts of draught drawing the same, one-sixth less than the tolls which are or shall be payable for

the same; and for every waggon, wain, cart, or other such carriage having the fellies of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, or for the horse or horses drawing the same, one-third less than the tolls or duties which are or shall be payable for the same by any Act or Acts of Parliament made for making, repairing, or maintaining any turnpike road.

By *Section 6*, Where any particular Act or Acts of Parliament now in force, for the making, repairing, or maintaining any turnpike road, shall direct a higher or lower rate of toll or tolls to be collected and taken on any waggon, wain, cart, or other such carriage, or on the horse or horses drawing the same, regulated by or in respect of the greater or lesser breadth of the wheels of such waggon, wain, cart, or other such carriage, and where, in addition to the tolls received under such particular Act or Acts, the additional tolls in respect of the breadth of wheels authorized to be taken by *Statute 13 Geo. 3. c. 84*, shall not have been collected and imposed, it shall be lawful for the trustees, acting in execution of any such particular Act or Acts of Parliament from and after the 1st day of January, 1824, to continue to collect the tolls directed to be taken under the powers and provisions of such Act or Acts of Parliament, in execution whereof they shall act, and they shall not impose the additional tolls authorized and required to be levied by the said recited Act (*3 Geo. 4. c. 126*) on waggons, wains, carts, or other such carriages, having the fellies of the wheels thereof of less breadth than six inches.

As to where the tolls are in the hands of lessees.—By *Sect. 7*, It is provided, That in every case where the tolls

By *Sect. 13*, To every caravan or other four-wheeled carriage used for the conveyance of goods, and built and constructed with springs, shall be allowed the weights following; that is to say, for every such carriage 3 tons 15 cwt. in winter, and 4 tons 5 cwt. in summer.

By *Sect. 14*, To each and every dray with two wheels of not less than $4\frac{1}{2}$ inches in breadth, and drawn by not more than three horses, and used in *London*, or within the bills of mortality, there shall be allowed at all times of the year, together with the loading of such dray, the full weight of 2 tons 16 cwt.; any thing in this Act or any Act, &c. to the contrary notwithstanding.

By *Sect. 15*, It shall be lawful for all trustees appointed by or under any Act or Acts of Parliament, for the making or maintaining of any turnpike road, or for any person or persons authorized by them, and they are hereby empowered and required to receive, take, and demand, over and above the tolls payable by any Act or Acts of Parliament now in force or hereafter to be passed, the following sums of money as additional toll for every hundred weight, of 112 lbs. to the hundred, which any waggon, cart, or other such carriage, together with the loading thereof, shall weigh at any weighing engine, over and above the weights hereinbefore allowed to each of them respectively; (that is to say) for the first and second hundred of such overweight, the sum of 3*d.* for each hundred; for every hundred of such overweight, above two hundred and not exceeding five hundred, the sum of 6*d.*; for every hundred of such overweight, above five hundred and not exceeding ten hundred, the sum of 2*s.* 6*d.*; and for every hundred of such overweight exceeding ten hundred, the sum of 5*s.*:—Which said additional sums or tolls hereby granted and made payable at any weighing engine, shall and may

be levied and recovered, in any of the cases aforesaid, in such manner as any other toll or duty, payable on the road on which any such weighing engine shall be erected, is or shall be by law to be levied and recovered; and the monies arising therefrom shall be applied to the repairs of the turnpike road on which the same shall be recovered (a).

No composition to be made for tolls for over-weight.—By Stat. 3 Geo. 4. c. 126. s. 19, It shall not be lawful for the trustees of any turnpike road, their lessee or leasees, collector or collectors, or other officers, to make any composition for any additional tolls or duties for or in respect of the over-weight, or in any other manner as to the weight which any waggon, wain, cart, or carriage shall carry or weigh, any law to the contrary thereof notwithstanding; but every contract and agreement for such composition for over-weight shall be null and void to all intents and purposes whatsoever; and every lessee, collector, or other officer entering into or agreeing to any such composition, and every person or persons with whom any such composition or agreement shall be made or entered into, shall, for every such composition or agreement, and for every abatement of the toll for over-weight, in consequence thereof, forfeit the sum of £50, to any person or persons suing for the same (b).

Power to reduce the tolls for over-weight within ten miles of London.—By Stat. 4 Geo. 4. c. 95. s. 20, The

(a) By 4 Geo. 4. c. 95. s. 8 & 9, provision is made for the case of tolls being in the hands of leasees, at the passing of the Act. These clauses are, however, merely

temporary in their operation.

(b) See post, p. 299, et seq. as to the exemptions from payment of toll for over-weight.

trustees of the several turnpike roads within ten miles of the cities of London and Westminster, and the borough of Southwark, may and they are hereby empowered at any meeting or meetings to be held for the purpose, (of which meeting or meetings, and the purposes thereof, fourteen days' notice shall be given,) to lower the several additional tolls by the said recited Act (a) directed to be taken for overweight, in such manner as to them shall seem fit and convenient, and from time to time to take such reduced tolls for overweight as shall be fixed and agreed on at such meeting or meetings.

Penalty for evading payment of toll for over-weight.—By Stat. 3 Geo. 4. c. 126. s. 20, If any person shall unload, or cause to be unladen, any goods, wares, or merchandize, from any cart, waggon, or other carriage, at or before the same shall come to any turnpike-gate or weighing engine erected by virtue or in pursuance of this or any other Act, made for the repair or preservation of any turnpike road, or shall load or lay upon such carriage, after the same shall have passed any such turnpike or weighing engine, any goods, wares, or merchandize, taken or unladen from any horse, cart, or other carriages belonging to or hired or borrowed by the same waggoner or carrier, in order to avoid the payment of the said respective duties payable for overweight; or if any person shall so unload in order to carry considerable quantities of goods through any turnpike-gate, or by any weighing engine in one and the same day, and thereby pay less toll at such turnpike-gate or weighing engine than would have been paid if such goods, wares, or merchandize had not been so unladen; Or if any driver of any waggon or cart

(a) 3 Geo. 4. c. 126.

shall not wait a reasonable time whilst any other carriage shall be weighed, which shall have come to the weighing engine before the carriage of which he shall be the driver; or if the driver of any waggon or cart shall refuse or delay to remove or drive any such waggon or cart from the weighing machine, in order, by such neglect or refusal, to impede or delay the weighing of any other waggon or cart, or shall turn or drive out of any road, in order to avoid or evade the weighing of any waggon or cart; each and every person so offending in any of the cases aforesaid, and being thereof lawfully convicted before one or more justice or justices of the peace for the limit where the offence shall be committed, upon the oath of one or more credible witness or witnesses, shall forfeit the sum of £5, to be levied upon the goods and chattels of the owner of such cart, waggon, or other carriage; and each and every driver, not being the owner of such waggon or carriage, so offending, and being thereof convicted as aforesaid, shall forfeit any sum not exceeding 40s., and in case of non-payment thereof, shall be committed to the house of correction for any time not exceeding two calendar months.

Provision for the erection of weighing engines.—By Stat. 3 Geo. 4. c. 126. s. 21, It is enacted, That it shall and may be lawful for the said trustees, at any of their respective meetings, if they think proper, to order (a) and cause to be built and erected, at any of the turnpikes or toll-gates on the roads under their care and management, or at such distance therefrom as they shall think expedient, one or more crane or cranes, machines or engines, with a suitable house or other building thereto,

(a) See Form, Appendix, No. LXIV.

proper for the weighing of waggons or carriages conveying any goods or merchandize whatsoever;—And by notice on a board for that purpose, to be put up at every such weighing machine, to order and direct all and every such waggons or carriages which shall come with 100 yards of any crane, machine, or engine, to be weighed, together with the loading thereof.

Carriages, &c. to be weighed.—By Section 22, The keeper of every toll-gate or bar, where any weighing engine shall be erected, or any other person appointed or to be appointed by the trustees, or by their lessee or lessees, to the care of such weighing engine, shall and is hereby required to weigh all such waggons, carts, and other carriages liable to be weighed, which shall pass loaded through such gates or bars respectively, and which he shall believe to carry greater weights than are allowed to pass without paying the said additional toll:—And if any collector or person so appointed shall permit any such waggon, cart, or other carriage to pass by or through any such toll-gate with greater weights than are hereby allowed, without weighing the same and receiving such additional tolls, he shall, for every such offence, forfeit the sum of £5:—And if the owner or driver of any waggon, cart, or other carriage, shall refuse to allow the same to be weighed, or shall resist any gate-keeper or toll-collector in weighing the same, every owner or driver so offending shall forfeit any sum not exceeding £5.

Power to trustees and surveyor to cause carriages, &c. to return to be weighed.—By Section 23, In order to detect the said collector or receiver in any fraudulent contrivance or neglect of duty in the matters aforesaid, It is enacted, That it shall be lawful for any trustee, or sur-

veyor of every turnpike road, if he shall suspect any such connivance or neglect, to cause any waggon, cart, or other carriage, which shall have passed through any toll-gate where any weighing engine shall be erected, and shall not have passed above 300 yards beyond such toll-gate, to return to such weighing engine, and be there weighed, with the loading which passed through such toll-gate, in the presence of such trustee or surveyor, upon requiring the driver thereof to drive such carriage back to such weighing engine, and upon paying or tendering to him the sum of 1s. for so doing; which sum of 1s. shall be returned to the person paying the same, if upon weighing such carriage and the loading thereof it shall be found above the weight hereby allowed.

And by *Sect. 24*, For the better enforcing the authority of this Act, it is enacted, That the surveyors of every turnpike road shall, and they are hereby authorized and required to make convenient places for turning such carriages upon every such turnpike road, where any weighing engine shall be erected, within 300 yards of such toll-gate, on each side thereof, if the ground will admit of the same:—And if the driver of any such carriage being so requested to return with his carriage to such weighing engine, shall neglect or refuse so to do, he shall forfeit any sum not exceeding £5; and it shall be lawful for any peace officer or other person or persons being then present, upon such neglect or refusal, to drive and take such carriage back to such weighing engine, in order to be weighed as aforesaid.

Adjoining trusts may erect mutual weighing engines.—By *Section 25*, When two or more turnpike roads meet at or near the same place, it shall be lawful for the trus-

tees of such turnpike roads respectively, at a meeting to be held for that purpose, to fix upon some convenient place to erect a weighing engine upon, which will accommodate all such turnpike roads, and by agreement (a) amongst themselves at such meeting to proportion the expences which may attend the making, erecting, maintaining, and keeping in repair such weighing engine, and likewise the money arising from forfeitures to be incurred for overweight at such weighing machine, amongst all such turnpike roads, in such manner as to them shall appear just and reasonable.

SIXTHLY: *As to exemptions from the payment of toll.*

Exemptions in Local Acts to be valid.—By Statute 4 Geo. 4. c. 95. s. 26, Nothing herein, or in 3 Geo. 4. c. 126, shall extend to repeal or take away any exemptions from toll, which shall have been granted or allowed by any Act for making or repairing any turnpike road.

Empty waggons not to pay toll, if going to, or returning from having fetched lading exempted from toll.—By Stat. 3 G. 4. c. 126. s. 26, In every case in which, under any Act or Acts of Parliament relating to any turnpike road, there is an exemption from toll or duty in respect of any horse, mule, ass, ox, waggon, cart, or other carriage, drawing or carrying any dung, mould, marl, or compost of any nature or kind soever, for improving or manuring the land, or hay, straw, or any other fodder for cattle, or materials for repairing any turnpike road or highway, such exemption shall be deemed to extend in respect of every such waggon, cart, or other carriage,

(a) See Form, Appendix, No. LXVI.

and also in respect to the cattle drawing the same, going empty or loaded only with implements necessary for more convenient carriage, or loading or unloading such lading, or returning empty, or with such implements as aforesaid, having been so laden, notwithstanding the said waggon, cart, or other carriage shall, for the purposes aforesaid, go to or return from any parish, or place, in which the said turnpike does not lie.

But by *Section 27*, For the preventing of frauds on toll-collectors by waggons, carts, or other carriages passing empty, or loaded only with implements necessary for the more convenient carriage of, or for loading or unloading manure, or materials for the repair of any turnpike road or highway, through turnpike-gates, under pretence of going for such manure, or materials, the owner or driver of every such empty waggon, cart, or carriage, claiming the same exemptions or any of them, shall, in all cases, pay the toll in respect of such waggon, cart, or other carriage, before the same shall be permitted to pass through such turnpike-gate; and the collector of such toll shall thereupon deliver to such owner or driver a ticket, to be marked "*manure exemption*" or "*road materials*," (as the case may be,) with the name of the gate and the date when delivered, and the amount of the toll so paid; all which sum or sums so paid shall be repaid to the owner, or driver of such waggon, cart, or other carriage, upon his or their returning with such waggon, cart, or other carriage so laden as aforesaid, and producing such ticket:—And every collector of such toll refusing to give such ticket on receiving the toll, or refusing or neglecting to return the same toll upon the return of such waggon, cart, or other carriage, so laden, and re-delivery of the "*manure exemption*" or "*road*

materials" ticket, (as the case may be,) shall, for every such offence, forfeit to the owner of such waggon, cart, or other carriage, a penalty of not more than £5, upon conviction thereof before one or more justice or justices of the peace for the county where such offence shall be committed, upon the oath of one credible witness.

Implements for loading and unloading shall not cause the payment of toll, from which the lading would otherwise be exempt.—By Section 28, The owner, or driver of any waggon, cart, or other carriage, laden with manure for land, or materials for any turnpike road or highway, passing through any turnpike-gate, or otherwise passing on or across any turnpike road, shall not be liable to pay any toll, nor shall any toll be demanded for such carriage so laden, or the cattle drawing the same, by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork necessary for loading or unloading such manure, or materials, being in or upon any such waggon, cart, or other carriage, in addition to such manure or materials, if the loading thereof is substantially manure for land, or materials for the repair of any turnpike road or highway, as aforesaid.

Post-horses, returning before nine o'clock the next morning, to pass toll-free.—By Section 29, All horses travelling for hire, under the Post-horse Duties' Acts (a), having passed through any turnpike-gate erected or to be erected on any turnpike road, drawing any carriage, in respect of which any toll shall have been paid, on returning through the turnpike-gate at which the toll shall have

(a) As to what is such a letting to hire as comes within the Post-horse Duties' Acts, see Hanley v.

Cubberly, 15 East, 257, and Ramsden v. Gibbs, 1 B. & C. 319, and the cases there cited.

been paid, and the other gates (if any) cleared by such payment, either without such carriage, or drawing such carriage, the same being empty, and without a ticket denoting fresh hiring, shall be permitted to pass toll-free, although such horses or carriages shall not have passed through such turnpike-gate on the same day; provided that such horses so travelling shall return before nine of the clock of the morning succeeding the day on which they first passed the turnpike-gate at which the toll shall have been paid.

Post-horses returning with a carriage.—By Section 80, Where any horse or horses shall pass through any turnpike-gate on any road, not drawing any carriage, and a toll shall be paid on such horse or horses at such turnpike-gate, and the same horse or horses shall return drawing any carriage on the same day, or within eight hours after their first passing through such gate, the toll paid on such horse or horses on their originally passing shall be deducted from the toll payable on the same when drawing the carriage to which they shall be attached on their return, so that no higher toll shall on the whole be taken than if such horse or horses had in the first place passed through such turnpike-gate drawing the said carriage.

It may be proper to mention, in this place, several decisions which tend to shew the construction that the Courts adopt, as to clauses of exemption from toll, upon the return of carriages or horses, which have upon the same day been previously charged. We have seen, that the exemptions contained in Local Acts are not repealed by the General Acts, where there is no express clause for that purpose. And as there is not any enactment in

the latter for regulating the case of return-carriages or horses, except in the particular instances mentioned in the preceding sections (29 and 30), the question must always depend upon the provision contained in each Local Act.

In the case of *Williams v. Sangar (a)*, the Local Act declared, that "no person shall be subject to the payment of toll more than once in any one day for passing and repassing with the same horse, &c. or carriage through the same turnpike; nor shall any person be subject to the payment of toll for the passage of any horse, &c. or carriage, in the same day, through more than one turnpike" on the several roads specified. By another clause, "no person who shall have paid the toll for the passage of any horse, &c. or carriage, through any turnpike-gate (on certain roads) shall be subject to the payment of any toll in the same day for the passage of the same horse, &c. or carriage, through any other turnpike-gate" (on certain other roads). Then by a clause, upon which the question arose, "in all cases of *carriages travelling for hire*, the traveller or passenger, travellers or passengers, conveyed therein, shall be considered as the person or persons paying the toll; and such payment shall not exempt such carriages repassing with a different traveller, &c. but he or they shall be liable to pay the toll as if the carriage had not before passed that day." Upon these clauses, it was contended, that a common stage-coach, returning with different passengers and different horses than those with which it had previously passed on the same day, was such a *carriage travelling for hire*, as was excluded by the last clause from the exemption contained in the two preceding

(a) 10 East, 66.

clauses. But the Court of K. B. were of opinion that a stage-coach was not a *carriage travelling for hire*, within the meaning of the clause, which appeared only to apply to post-chaises and other carriages, that are frequently hired to pass and repass on the same road with different travellers on the same day; and where the respective travellers may properly be said to have hired the carriage, each in his turn. Here we must look to the difference between what, strictly speaking, is a traveller or passenger *hiring a carriage*, and one who only hires a *place* in a carriage, but cannot be said to hire the carriage itself, which is a distinction that is well understood.—In the same case it was also decided, that the toll was payable in respect of the carriage, and not of the horses; and that, therefore, the circumstance of the coach returning with fresh horses was not sufficient to exclude it from the benefit of the exemption from toll.

And the last point in the above case of *Williams v. Sangar*, is confirmed by a still later case, where the Local Act imposed a toll upon “every coach, &c. drawn by four horses,” so much; and the exemption was “for any person passing and repassing the same day with the same horses, cattle, beasts, and carriages.” A stage-coach, drawn by four horses, passed through a gate erected under this Act of Parliament, and paid the toll. In the evening of the same day, the same coach repassed through the same gate with the same coachman, but with different horses and passengers. And the Court of K. B. held, that a second toll was not payable in respect of this carriage and horses (a).

(a) *Waterhouse v. Keen*, 4 B. & C. 200.

And the same rule was applied *reversely* in the case of *Jackson v. Curwen* (a). There by the Local Act, the toll was imposed upon "every horse or other beast of draught drawing any coach," &c.; and upon every horse, &c. not drawing; and upon "every drove of oxen," &c. And it was enacted, "That nothing therein contained should be construed to enable any collector to demand or take any more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle, passing once and repassing once in the same day, through the same or any other gate or gates on any of the said roads, such person producing a ticket denoting that such toll has been paid on that day for or in respect of such horse, beast, or other cattle, on the said roads." And it was held, that a second toll was not payable in respect of the same horses passing once and repassing once on the same day, but drawing a different carriage belonging to the same proprietor. *Per* Bayley, J. "It is an established rule, that where toll is imposed upon carriages drawn by horses, and there is a clause of exemption for all persons repassing on the same day with the same horses and carriage, or with the same horses or carriage, and the same carriage returns the same day, drawn by different horses, no second toll is payable. And where the toll is imposed upon the horses drawing the carriage, with a similar clause of exemption, no second toll is payable, if the same horses return with a different carriage." And the learned Judge was of opinion, that, upon the true construction of the whole clause, the introduction of the word "carriage" ("to take more than one toll in respect of the same carriage, horses,

(a) 5 B. & C. 31. See a similar decision in *Chambers and*

others v. Williams, 5 B. & C. 36, note.

beast, or other cattle") was not sufficiently explicit to require both the same carriage and the same horses to repass, in respect of which the toll had already been paid.

Where by a Local Act, the toll, when carriages passed, was imposed on the carriages and not on the horses drawing them; and it was provided, that no person having paid the tolls or duties thereby directed to be paid at any of the gates through which such person shall pass with any horse, &c. and producing a ticket, &c. shall be liable to pay again for returning ever so often through the same gate on the same day; and by a subsequent Local Act, applying to the same turnpike, and reciting the former Act, the old tolls were repealed, and the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them; and in this latter Act, all the provisions, regulations, and clauses of the former were continued as fully as if they had been re-enacted: It was held that where the toll imposed by the latter Act, had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage (a).

And a similar, though even stronger, decision was made in the case of *Fearnley and others v. Morley* (b). The only difference between the cases is, that in the latter, the original clause for exemption was more minute in particularizing the subjects for such exemption. It was there provided, that every person having once paid the tolls "so made payable as aforesaid for his and their

(a) *Gray v. Shilling*, 2 B. & B. 30.

(b) 5 B. & C. 25.

carriage, horses, and cattle," and returning with the same carriage, horses, and cattle, should have liberty to pass toll-free; so that a verbal substitution would be necessary to meet the intention of the Legislature in the Act in which the clause was to be incorporated.

In another case (*a*), by the enacting clause of a Turnpike Act, it was provided, that the tolls following should be taken of *every person attending* any cattle or carriage, viz. "for every horse drawing any stage-coach, the sum of," &c. By an exempting clause it was added, "that if any *person* should have paid the toll for passing, the *same person*, upon producing a ticket, should be permitted to repass free with the same cattle or carriage." It was held by the Court of C. P. that where the toll had been paid by one coachman on passing, for horses drawing a stage-coach, a second toll could not be demanded for the same horses repassing, though with a different coach, and a *different coachman*, but belonging to the same proprietor. And *per* Best, C. J. "It has often been declared from the Bench in Westminster Hall, that they who seek to exact tolls, through the medium of the Legislature, must speak plain language: the toll receivers are before those who pass the Act, but not the toll payers; and it is incumbent on the Courts to take care of the interest of the payers. As to the question whether, in order to claim the exemption, the hand that paid the toll in returning ought to be the same as the hand that paid it in going, there can be no doubt: for in both cases, though it is the coachman who offers the money, it is the master who pays; the money is his; he alone is entitled to recover for money had and received,

(*a*) *Norris and others v. Poate*, 5 Bingham 41.

where it has been wrongfully paid; and he is so far constructively present, as to be answerable for any negligence on the part of the coachman."

But although the toll be imposed only upon the carriage, or only upon the horses which draw it, yet the clause for exemption upon repassing may be so worded as to require both the carriage and the horses to be the same as before, in order to come within its bounty.

Thus where, by a Turnpike Act, a toll was imposed upon every horse drawing any coach or other carriage; and the statute provided that no person should be liable to pay toll more than once in any one day at any toll-gate, for passing and repassing "with the same horse or horses, cattle, beasts, and carriages; but that every person having paid toll once as aforesaid, and producing a ticket, &c. shall afterwards pass and repass with the same horse or horses, cattle, beasts, and carriages, toll-free, during the same day," &c. A stage-coach, drawn by four horses, passed and paid toll. In the evening of the same day, a different coach, called by the same name, belonging to the same proprietor, and drawn by the same four horses, but carrying different passengers, passed through the same gate: And the Court of K. B. held, that a second toll was payable in respect of this carriage and horses. Mr. Justice Bayley, after stating that the toll was imposed upon the horses and not upon the carriage, proceeds to observe, "But then by the 18th section, no person is to pay toll more than once at any one gate for passing and repassing in any one day with the same horse or horses and carriages, but every person having paid toll once, and producing a ticket, shall afterwards pass and repass with the same horse or

horses and carriages, toll-free. Now, as no toll was imposed by the enacting clause upon the carriage, there could be no reason for introducing that word into the proviso, unless it were intended to confine the exemption, in respect of horses drawing carriages, to the same horses drawing the same carriage; and it may be very reasonable that the exemption should be limited to that case, for otherwise the same horses, with a different hired chaise, and with different travellers, would be exempt from the payment of toll." And so *per* Holroyd, J. "Here the plaintiff cannot bring himself within the proviso, unless some of the words contained in it be altered, or rejected altogether. The word 'carriage' occurs several times in the proviso, and accompanied with such other words as shew clearly that there must be both the same horses and the same carriage, in order to entitle a party passing the gate a second time to the exemption (a)."

I have been the more particular in my detail of the judgment of the Court in the last case, because it is difficult to reconcile with it the decision in the case of *Jackson v. Curwen*, before referred to (b); indeed, after a minute inspection into both cases (and the more careful, from the high regard which all must entertain for the able and learned Judge who decided both of them), I cannot perceive any material distinction between the circumstances respectively attending them. In *Jackson v. Curwen*, the exemption is expressed to be in favor of "the same carriage, horses, beast, or other cattle passing and repassing," &c. upon producing a ticket denoting that such toll has been paid in respect of "such horse,

(a) *Loaring v. Stone*, 2 B. & C. 515.

(b) See *ante*, p. 286.

beast, or other cattle." And a clause is added (which was noticed in the judgment of the Court) by which the trustees are empowered to compound for the tolls to be charged upon "such horses, beasts, or other cattle." In *Loaring v. Stone*, the exemption is expressed to be for "passing and repassing with the same horse or horses, cattle, beasts, and carriages," and upon producing a ticket denoting the payment of the toll aforesaid (which was in respect of the horses), every person shall pass and repass "with the same horse or horses, cattle, beasts, and carriages," toll-free. And a clause, to balance the additional clause in the last case, is inserted, that upon any refusal to pay toll, the collector may distrain "any horse, cattle, or beast, upon which any toll is imposed by this Act." Now the only point of difference between the two cases, which I can discover, is that the word "carriage" follows the word "horses" in the one case, while in the other it is placed the first. It is true, that in *Loaring v. Stone*, the expression is oftener repeated; and as Mr. Justice Holroyd observed, the word "carriage" occurs several times; but the repetition of the words appear to be with no specific object, and whenever these phrases occur, they are used in an exactly parallel sense, so that their frequency can have little influence as to their meaning. In this state of doubt, what is the real interpretation of such a clause, is a question which cannot be solved by any jurisdiction inferior to that which has created the difficulty. The case of *Jackson v. Curwen* may be said to be authoritative, as being "the latest expression of the opinion of the Court," while that of *Loaring v. Stone*, may claim precedence, as being the "oldest decision." All I can do is, to submit to the reader the argument of Mr. Justice Bayley, upon this point, in the former case, as an antidote

to what he may have already imbibed from the other. He there says (*a*), "From the latter part (*b*) of the clause it appears that the Legislature contemplated a toll upon horses only. From the former part, that they contemplated a toll in respect of the carriage. Taking the whole of the clause together, it seems very doubtful whether it was intended to be confined to cases only where the same persons returned with the same horses drawing the same carriage. There is another clause, which shews that the objects of the toll were the horses, beasts, and cattle, and not the carriage. By section 28, the trustees are enabled to compound with any person for any horses, beasts, or cattle passing on the roads, for any of the tolls to be paid in respect of the same. Considering, therefore, that the toll was originally imposed upon the horses drawing, and not upon the carriage, and that it does not appear clearly that the Legislature meant to confine the operation of the exempting clause to cases only where the same horses returned with the same carriage, we think that the general rule of construction, applicable to these Acts of Parliament, ought to prevail; and consequently that no second toll was payable for and in respect of the same horses returning the same day with a different carriage, the property of the same person."

General exemptions from toll.—By Statute 3 Geo. 4. c. 126. s. 32, No toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament, on any

(*a*) See 5 B. & C. 35.

(*b*) In the reciprocal case, this was by reference—"the toll aforesaid,"—which was imposed upon

the horses only. In this case, it is "a ticket denoting that such toll has been paid in respect of such horse, beast, or other cattle."

turnpike road, of or from any person or persons, for any horse or horses or other beast or cattle, or for any waggon, wain, cart, or other carriage, employed in carrying or conveying, or going empty to fetch, carry, or convey, or returning empty from carrying or conveying, having been employed only in carrying or conveying, on the same day, any stones, bricks, timber, wood, gravel, or other materials for making or repairing any turnpike road or public highway, or for building, rebuilding, or repairing any present or any future bridge or bridges on any such road or public highway;—Or of or from the surveyor of any turnpike road, when engaged in executing or proceeding to execute, within the limits of his own trust (*a*), the powers of this or any other Act or Acts of Parliament for repairing, maintaining, or relating to any turnpike road;—Or for any horse, beast, or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day, any dung, soil, compost, or manure (*save and except lime (b)*), for improving lands (*c*); or any ploughs, harrows, or implements of husbandry (unless laden also with some other thing not hereby exempted from toll); or any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder, or corn in the straw, potatoes, or other agricultural produce, and which has not been bought, sold, or disposed of, nor is going to be

(*a*) In 3 Barn's Justice, p. 974, (24th edition) it is by mistake stated that this clause is repealed by 4 Geo. 4. c. 95. s. 25. The repeal is confined to "*any adjoining trust.*"

(*b*) The words in italics in this

section, shew that they are intended to be afterwards commented upon.

(*c*) See 4 Geo. 4. c. 95. s. 23, post, p. 298, that manure, expressly charged with toll by any Local Act, shall not be exempted.

sold or disposed of (a);—Or for any horses or other beasts employed in husbandry going to or returning from plough or harrow, or to or from *pasture or watering-place*, or going to be or returning from being shod or farried, such horses or other beasts not going or returning on those occasions more than two miles on the turnpike road on which the exemption shall be claimed;—Or of or from any person or persons going to or returning from his, her, or their *proper parochial church or chapel*, or of or from any other person or persons going to or returning from his, her, or their usual place of religious worship tolerated by law, on Sundays, or on any day on which divine service is by authority ordered to be celebrated;—Or of or from any inhabitant of any parish, township, or place, going to or returning from attending the funeral of any person who shall die and be buried in the parish, township, or hamlet in which any turnpike road shall lie;—Or from any rector, vicar, or curate, going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish;—Or for horses, carts, or waggons employed only in carrying or conveying any vagrant sent by a legal pass, or any prisoner sent by any legal warrant, or returning empty after having been so employed;—Or for any horses or carriages, of whatever description, employed or to be employed in conveying the mails of letters and expresses under the authority of his Majesty's Post-master General, either when employed in conveying, fetching, or guarding such mails or expresses, or in returning back from conveying or guarding the same;—Or for the horse or horses of any officers

(a) These exemptions in favor of agriculture are to be beneficially construed, Higginbotham

v. Perkins, 8 Taunt. 795.—3 J. B. Moore, 185, S. C.

or soldiers on their march or on duty; or for any horse or horses or other beast, or any cart, carriage, or waggon employed in carrying or conveying, or returning empty from carrying or conveying, having been employed only in carrying or conveying the arms or baggage of any such officers or soldiers, or employed in carrying or conveying, or returning empty from having been employed only in carrying or conveying, any sick, wounded, or disabled officer or soldiers; or for any waggon, wain, cart, or other carriage whatsoever, or the horse or horses or other cattle drawing the same, employed in conveying any ordnance, or barrack, or commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces, or returning empty from having been so employed; or for any carriage conveying volunteer infantry, or for any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and rode by him in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty, provided that such person shall be dressed in the uniform of his corps, and shall have his arms, furniture, and accoutrements according to the regulations of such corps, at the time of claiming the exemption;—Or for any horses or carriages carrying or conveying any person or persons to or from any election or elections of a knight or knights of the shire to serve in parliament for the county or counties in which such turnpike road shall be situated; Or for any horses or carriages which shall only cross any turnpike road, or shall not pass above one hundred yards thereon (a).

(a) This clause is worded so as to avoid an objection, that arose on stat. 13 Geo. 3. c. 84. s. 31,

which contained a similar exemption, but differently worded, viz. "which shall only cross such road,

"Save and except lime."—It was doubted whether, under this clause, lime for improving land, although exempted from toll by several Local Acts, might not by this enactment be chargeable with toll; Therefore to remove such doubt, it is enacted, by *Stat. 4 Geo. 4. c. 16. s. 1*, That nothing in the above Act shall extend or be construed to extend to enable any collector of tolls authorized to be taken under any Local Act or Acts of Parliament, for horses or carriages employed in carrying or conveying lime for the improvement of land, to take or demand any toll for lime as aforesaid, other than such as might have been demanded and taken under the authority of any such Local Act, previous to the passing of the above Act:—And the 2d section provides for an abatement in the rent payable by any collector, who shall have made his contract under the impression that such toll for lime was payable.

"Going to or returning from pasture or watering-place."—Where a Turnpike Act, after imposing tolls on horses, &c. exempted therefrom "cattle going to or returning from pasture," and "horses attending cattle returning from pasture;" It was held by the Court of K. B. that a horse, ridden by the owner of the cattle at pasture in order to fetch them from pasture, did not come within either of the exemptions (a).

and shall not pass above one hundred yards thereon." It was contended, that a carriage which did not cross the road, but quitted it again on the same side on which it entered, was liable to toll, though it did not traverse the one hundred yards. But the Court of C. P. de-

cided that it was not liable, observing, that the statute meant to exempt carriages making a very slight use of the road, *Major v. Oakenham*, 5 Taunt. 340.

(a) *Harrison v. Brough*, 6 T.R. 706.

“*Proper parochial church or chapel.*” —In the case of *Lewis v. Hammond* (a), where in a Local Act there was a provision, that no toll should be demanded for the passage of any person residing in any parish or township in which the roads lay, “going to or returning from their proper parochial church, chapel, or other place of religious worship on Sundays,” it was decided, that the word *parochial* extended over the whole clause; and that, therefore, a dissenter was not within the exemption in going to, or returning from, his proper place of religious worship, situated out of the parish in which he resided. If we bear in mind this decision, the above clause of the *Stat. 3 Geo. 4. c. 126*, will clearly be understood to mean, that the exemption from toll applies to the members of the established church, only in going to or returning from their *parochial* church or chapel; while dissenters are freed from the payment of toll, if going to or returning from their *usual* place of worship, in whatever parish the same may be situated.

And by *Stat. 3 Geo. 4. c. 126. s. 33*, It is provided, That so much of this Act as directs, that no toll shall be demanded or taken from any person or persons going to or returning from his, her, or their proper parochial church or chapel, or of or from any other person or persons going to or returning from his, her, or their usual place of religious worship tolerated by law, shall not extend or be construed to extend, so as to exempt any such person or persons from the payment of toll at any turnpike-gate situate *within* the distance of five miles of the Royal Exchange in the city of London, or within the distance of five miles of Westminster Hall in the city and liberties of Westminster.

(a) 2 B. & A. 206.

Manure, expressly charged with toll by Local Act, not to be exempted.—By Stat. 4 Geo. 4. c. 95. s. 23, Nothing in Stat. 3 Geo. 4. c. 126, or this Act contained, shall extend to exempt any waggon, wain, cart, or other carriage laden with dung, compost, or manure for manuring land, or any horse or other beast drawing the same, from any toll imposed in respect thereof by any Local Act or Acts for making, repairing, and maintaining any particular roads, where in such Act or Acts such dung, compost, or manure shall be specially made subject to toll throughout the whole of such roads, without any local, parochial, or partial exemption,

Carriages, &c. attending his Majesty to be exempt from toll.—By Section 24 of the same Act, No toll shall be demanded or taken by virtue of the said recited Act or this Act, or any other Act or Acts for making or maintaining turnpike roads, for any horses or carriages attending, or going to attend, or returning from having attended his Majesty, or any of the Royal Family.

Exemption from toll not to extend to over-weight, unless expressly so enacted.—By Stat. 4 Geo. 4. c. 95. s. 17, In case where any exemption from toll shall be claimed or allowed under the provisions of Stat. 3 Geo. 4. c. 126, or this Act, or any other Act or Acts for repairing and maintaining any turnpike road, such exemption shall not extend to or be allowed for the additional tolls imposed by the said recited Act, and directed to be taken for every cwt. of 112 lbs. to the hundred, which any waggon, cart, or other such carriage, together with the loading thereof, shall weigh at any weighing engine, over and above the weights in and by the said recited Act allowed to each of them respectively, unless the waggon, wain, cart, or other

such carriage, in respect of which the exemption shall be claimed, shall likewise be by the said recited Act, or this or some other Act or Acts, specially exempted from such additional tolls for over-weight; but in all cases (where not specially exempted) the said additional toll shall be paid, and only the original toll allowed.

Exemptions from payment of toll for over-weight (a).
By *Statute* 4 Geo. 4. c. 95. s. 19, Nothing in 3 Geo. 4. s. 126, or this Act, relating to the tolls payable in respect of the weight of carriages, shall extend or be construed to extend to any chaise marine, coach, landau, berlin, barouche, phaeton, sociable, chariot, calash, hearse, break, chaise, curricule, gig, chair, or taxed cart, or any cart not drawn by more than one horse or two oxen.

By *Stat.* 3 Geo. 4. c. 126. s. 16, It is provided, that the regulations of weight hereinbefore mentioned and provided shall not extend, or be deemed or construed to extend to any waggons, carts, or other carriages carrying only manure or lime for the improvement of land, or any hay, straw, fodder, or corn unthrashed, except hay, straw, fodder, or corn carried for sale; nor to any waggons, carts, or other carriages, carrying only one tree, or one log of timber, or one block of stone, or one cable or rope; nor shall the said regulations of weight extend to any chaise marine, coach, berlin, barouche, sociable, chariot, calash, hearse, break, gig, chaise, or taxed cart.

By *Statute* 4 Geo. 4. c. 95. s. 21, The regulations of weight in *Stat.* 3 Geo. 4. c. 126, or this Act mentioned

(a) See ante, p. 269, as to the exemption from the additional tolls

imposed in respect of the breadth of wheels.

and provided, shall not extend to any waggon, wain, cart, or other carriage carrying only one block, plate, roll, or vessel of iron or other metal, or compounded of any two or more metals cast, wrought, or united in one piece.

And by the 35th *Section* of the same *Stat.*, No person owning or driving, or causing to be driven any waggon, wain, cart, or other carriage, provided for the service of his Majesty's forces, or conveying any ordnance, or barrack, or commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces, shall be subject to any additional toll, penalty, or forfeiture for over-weight; nor shall any such waggon, wain, cart, or other carriage, or the horse or horses drawing the same, while so employed, be stopped or detained by reason of any weight in any such waggon, wain, cart, or other carriage, or of being drawn by any number of horses or oxen; but it shall be lawful for the owner or driver of any such waggon, wain, cart, or other carriage, to put any number of horses or oxen, to such waggon, wain, cart, or other carriage.

Restriction upon exemptions from toll for over-weight, with regard to the wheels of the carriage.—By *Stat. 4 Geo. 4. c. 95. s. 10*, No person shall, by virtue of the said Act, or this or any other Act, have the benefit of any exemption from toll, or penalties for over-weight, or pay less toll for or in respect of any waggon, wain, cart, or other carriage, or the horses or beasts drawing the same, and carrying any particular kind of goods, than other carriages of the like nature carrying other goods ought to pay, unless such waggon, wain, cart, or other carriage, in respect of which the exemption shall be claimed, shall have the sole of the bottom of the fellies

of the wheels thereof of the breadth or gauge of $4\frac{1}{2}$ inches or upwards, (other than and except carts and carriages employed in carrying corn or grain in the straw, hay, straw, fodder, dung, or lime for the improvement of land, or other manure, or any plough, harrow, or implements of husbandry only,) but the tolls imposed by any Act, together with the additional tolls required to be taken for or in respect of every such waggon, wain, cart, or other carriage, having the sole or bottom of the fellies of the wheels thereof of less breadth or gauge than $4\frac{1}{2}$ inches as aforesaid, and for horses or beasts of draught drawing the same, and the additional tolls or penalties for overweight (except as before excepted), shall be paid in the same manner, to all intents and purposes, as if no exemption or less toll had been allowed, and as fully as all other waggons, wains, carts, and carriages, and horses drawing the same ought to pay, which are not entitled to any exemption, or to pay a less toll than any other waggons, wains, carts, and carriages.

Penalty for fraudulently claiming exemption.—By *Stat. 3 Geo. 4. c. 126. s. 36*, If any person or persons shall, by any fraudulent or collusive means whatsoever, claim or take the benefit of any exemption from toll or overweight, or for using any additional horse or horses, or of any other exemption or exemptions whatsoever in this Act contained, every such person shall, for every such offence, forfeit any sum not exceeding £5; and in all cases the proof of exemption shall be upon the person claiming the same.

By *Stat. 9 Geo. 4. c. 77. s. 17*, If any person or persons shall claim or take the benefit of any of the exemptions mentioned in any local Turnpike Act, not being entitled to the same, every such person shall, for every such

offence, forfeit any sum not exceeding £5; and in all cases the proof of exemption shall be upon the person claiming the same.

SEVENTHLY: *As to the Power to raise Money upon Mortgage of the Tolls.*

Power to trustees to grant, and to grantee to assign, mortgage of tolls.—By Stat. 3 G. 4. c. 126. s. 81, It shall be lawful for the trustees of any turnpike road, to borrow and take up at interest, on the credit of the tolls arising on such road, such sum or sums of money as they shall from time to time think proper, and to demise and mortgage the tolls on such road, or any part or parts thereof, and the turnpikes and toll-houses (a) for collecting the same, (the costs and charges of which mortgages shall be paid out of the tolls), as a security to any person or persons, or their trustees, who shall advance such sum or sums of money; which mortgages shall be in the words or to the effect following; (that is to say),

By virtue of an Act passed in the — year of the reign of —, intituled [here set forth the title of this Act], We, whose hands and seals are hereunto subscribed and set, being — of the trustees [or, commissioners] for putting into execution an Act, passed in the — year of the reign of —, intituled [here set forth the title of the Act under which the trustees or commissioners

(a) Where a Turnpike Act authorized the trustees "to take up at interest any sum upon credit of the tolls, and to assign the said respective tolls," as a security; and it was also declared that there should be no preference between the mortgages; it was decided,

that the trustees had no power to mortgage the *toll-houses*; and that, where they had in fact made such a mortgage, they were not estopped by their deed, from insisting that the Act gave them no such power. *Fairtitle v. Gilbert*, 2 T. R. 169.

borrowing the money and granting the mortgage shall act,] *in consideration of the sum of £—— sterling, advanced and paid by A. B. of —— to the treasurer of the said trustees, [or, commissioners] do hereby grant and assign unto the said A. B. and his executors, administrators, and assigns, such proportion of the tolls arising and to arise on the said turnpike road, and the toll-gates and toll-houses erected or to be erected for collecting the same, as the said sum of £—— doth or shall bear to the whole sum now or hereafter to become due and owing on the security thereof: To have, hold, receive, and take the said proportion of the said tolls, toll-gates, toll-houses, and premises, with the appurtenances, unto the said A. B. and his executors, administrators, and assigns, for and during the residue of the term for which the said tolls are granted by the said last-mentioned Act, unless the said sum of £——, with interest after the rate of £—— per centum per annum, shall be sooner repaid and satisfied. Given under our hands this —— day of —— A. D. 18——.*

And copies of all such mortgages shall be entered in a book or books to be kept for that purpose by the clerk or treasurer to the said trustees, for which entry such clerk shall be paid the sum of 5s. and no more, out of the tolls payable on such road; and which said book or books shall and may, at all seasonable times, be perused and inspected without fee or reward:—And it shall be lawful for all persons respectively, to whom any mortgage shall be made as aforesaid, or who shall be from time to time entitled to the money thereby secured, to assign or transfer his, her, or their right, title, and interest in and to such mortgage, and the principal money and interest thereby secured to any other person or persons whomsoever; which assignment or transfer may be made in the following words, or words to the like effect, to be in-

dorsed on such mortgage security, or to be under-written or thereunto annexed, and signed in the presence of and attested by one or more credible witness or witnesses; (that is to say),

I, A. B. [or, I, C. D., assignee, executor, or, administrator of A. B., as the case may happen] do hereby assign and transfer this mortgage security, with all my right and title to the principal money thereby secured, and all interest now due and hereafter to grow due upon the same, unto E. F., his [or, her] executors, administrators, and assigns. Dated this — day of — 18—. .

Witness, G. H.

(Signed) A. B. [or, C. D.]

Which transfer shall be produced and notified to the clerk, or treasurer of the said trustees, within two calendar months next after the day of the date thereof, who shall enter the same in the said book or books, for which entry the said clerk or treasurer shall be paid the sum of 5s. and no more; and such transfer shall then entitle such assignee, his executors, administrators, and assigns, to the full benefit of such mortgage security; and every such assignee may, in like manner, assign or transfer the same, and so *toties quoties*:—And it shall not be in the power of any person or persons (except the person or persons to whom the same shall be last transferred, his, her, or their respective executors or administrators,) to release, discharge, or make void the original mortgage security, or the monies due thereon, or any part thereof:—And all persons to whom any such mortgage or transfer shall be made as aforesaid shall, in proportion to the sum or sums of money thereby secured, be creditors on the tolls by such Act granted, and on the said toll-gates and toll-houses, in equal degree one with another, or in such order as shall be agreed upon and stipulated by the said trustees at the time of the advance of their respective shares.

Any mortgagee may maintain ejectment.—In the case of *Doe ex dem. Banks v. Booth* (a), it was decided, upon a mortgage of tolls similar to the above form, that any one creditor might maintain an ejectment for the toll-houses, &c.; but that he would become the bailiff of the rest of the creditors as to all except his own proportion. The principle of this decision is thus broadly stated by Lord Eldon, C. J.—Alluding to the case of *Fairtitle v. Gilbert* (b), in which the trustees were not empowered to mortgage the toll-houses, his Lordship observes, “It was thought, that if a power had been given to mortgage the toll-gates a difficulty would have arisen, by giving a preference, which was contrary to the intention of the Act. But it does not appear to me that this difficulty would have arisen, even if such a power had been given. For I should have been inclined to hold, that *whatever were the form of the demise*, it could only operate so as to effectuate the Act; that is, so that every other creditor should receive his due proportion, for which purpose the mortgagee must have stood in the situation of bailiff or trustee for all the other creditors.”

In confirmation of this decision it is enacted, by *Stat. 3 Geo. 4. c. 126, s. 49*, That if any mortgagee or mortgagees of any tolls, toll-gates, bars, chains, toll-houses, and buildings, on any turnpike road, shall seek to obtain the possession of the said toll-gates, bars, chains, toll-houses, and buildings, in order to pay himself, herself, or themselves the principal money and interest, or any part thereof, due to him, her, or them, it shall be competent for him, her, or them, as lessor or lessors of the plaintiff, and upon his, her, or their demise only, and without uniting in such demise the other mortgagees of

(a) 2 Bos. & Pul. 219.

(b) See ante, p. 302, note (a).

the said tolls and premises, to obtain such possession:— But such person or persons who shall obtain the possession thereof, shall not apply the tolls which may consequently be received by him, her, or them, to his, her, or their own exclusive use and benefit, but to and for the use and benefit of all the mortgagees of the said premises, *pari passu*, and in proportion to the several sums which may be due to them as such mortgagees.

Recovery of subscriptions.—By Stat. 9 Geo. 4. c. 77. s. 7, It is enacted, That the several and respective persons who shall subscribe for or agree (a) to advance any money for or towards the making or maintaining any turnpike road or roads, or highway intended to be made turnpike, shall and they are hereby required to pay the sum or sums of money so subscribed, within such time or times, and in such parts and proportions, as shall be expressed in the writing which shall be subscribed by them or on their behalf, or as the trustees of any such turnpike road shall order and direct; and the same shall be demanded by and paid to such person or persons as the said trustees shall, by any writing under their hands, authorize to receive the same:—And if any person or persons shall neglect or refuse to pay the same or any part thereof, as aforesaid, it shall be lawful for the said trustees to sue for the same in the name of any one of such trustees or of their treasurer or clerk, and to recover the same, together with full costs of suit, in any of his Majesty's Courts of Record, by action of debt, or on the case, by bill, plaint, suit, or information, wherein no essoign, protection, or wager of law, nor more than one imparlance, shall be allowed:—And all such monies shall be vested in

(a) See Form of Agreement, Appendix, No. LXXVII.

the said trustees, and applied as in the Act for making or maintaining any such turnpike road or roads shall be mentioned.

Mortgagees in possession to account to trustees.—By Stat. 3 Geo. 4. c. 126. s. 47, All and every mortgagee and mortgagees that hath or have taken or been in possession, or shall hereafter take or be in possession of any toll-gate or bar set up or erected on any turnpike road, or of any lands or tenements, the rents and profits whereof are appropriated to the repairs of any part of any turnpike road, shall, within twenty-one days after he, she, or they shall have received notice in writing from the trustees of such turnpike road, render an exact account in writing to such trustees, or to such person as they shall appoint, of all monies received by such mortgagee or mortgagees, or by any other person or persons for his, her, or their use and benefit, or by his, her, or their authority, at such toll-gate or bar or otherwise, and what he, she, or they have expended in keeping or repairing the same:— And in case he, she, or they shall neglect to render such account when required as aforesaid, he, she, or they shall severally forfeit to the said trustees, for every refusal, neglect, or omission, the sum of £50, to be applied to the use of the road on which such toll-gate or bar shall be erected.

Penalty on mortgagees retaining possession, after satisfaction of his debt.—By Section 48, If any such mortgagee or mortgagees shall keep possession of any toll-gate or bar by him, her, or themselves, or by any other person or persons on his, her, or their behalf, and receive the tolls or duties thereat, or of any such rents and profits as aforesaid, after such mortgagee or mortgagees shall

all judges and justices having jurisdiction, as the case may require, until the same are fully satisfied and performed, on account and for the benefit of the trust to be created by any subsequent Act for maintaining the same turnpike road, or any part thereof.

By *Section 12*, The trustees appointed by virtue of any local Turnpike Act may receive in and cancel all or any of the mortgages granted under the trusts of any former Act for the same turnpike road, or any part thereof, and instead and in lieu thereof give and execute another mortgage or other mortgages, at the expence of the parties requiring the same.

Power to renew mortgages which are lost or mislaid—
By *Section 13*, of the same Act, It is enacted, That in all cases where it shall appear by the books kept by the clerk or treasurer to the trustees of any turnpike road, or by any satisfactory evidence adduced at any meeting of such trustees, that any person or persons is or are a creditor or creditors on security of the tolls authorized by any local Turnpike Act to be taken, and that the mortgage or assignment of the tolls for securing any such sum or sums of money has been lost, mislaid, or by accident destroyed, it shall be lawful for the said trustees, or any three or more of them, to execute, at the expence of the person or persons applying for the same, an assignment of the tolls by any such local Turnpike Act granted, for the sum or sums of money mentioned in such original assignment or transfer; and every assignment to be executed shall be valid and effectual for the purposes thereby intended.

Trustees not to be personally liable on mortgages.—
By *Stat. 4 Geo. 4. c. 95. s. 61*, It is provided, That the

trustees for making or maintaining any turnpike road, shall not be personally subject to or liable to be charged with the payment of any sum or sums of money, by reason of their having signed or executed any mortgage or assignment by way of mortgage, or other security to be made by virtue or in pursuance of any Act for making or maintaining any turnpike road;—Provided that in case any action, suit, or prosecution shall be brought or commenced against any such trustee, for any thing done by virtue or in pursuance of *Stat. 3 Geo. 4. c. 126*, or this Act, or any such Act for making or maintaining any turnpike road, all the costs, charges, and expences of defending such action, suit, or prosecution, or which such trustee shall incur in consequence thereof, shall be defrayed out of the tolls arising on the turnpike road for which such trustee shall act.

EIGHTHLY: Certain Miscellaneous Regulations as to repair of Turnpike Roads, and as to the execution of the Acts.

As to the tires of wheels.—By *Stat. 4 Geo. 4. c. 95. s. 2*, It is enacted, That from and after the 1st day of January, 1826, the several nails of the tire or tires of the wheels of every waggon, wain, cart, or other such carriage, used or drawn on any turnpike road, shall be so countersunk as not to project beyond one quarter of an inch above any part of the surface of such tire or tires:—And if any waggon, cart, or other such carriage, shall, from and after the said 1st day of January, 1826, be drawn or used on any turnpike road, with any wheel or wheels made, constructed, or being otherwise than as hereinbefore last described, the owner or owners

thereof shall forfeit any sum not exceeding 40*s.*, and every driver thereof any sum not exceeding 20*s.* for each and every time that such waggon, cart, or other such carriage shall be used or drawn on any turnpike road.

Carriages used on railways not to be drawn on turnpike roads.—By Section 16, If any waggon or cart built or constructed to be and usually used on any railway or tram-road, shall be drawn or pass, loaded, on any turnpike road, out of and away from such railway or tram-road, for the distance of more than 100 yards, the owner or proprietor of every such waggon or cart shall forfeit and pay the sum of 40*s.*, and the driver thereof, not being the owner, the sum of 20*s.* for each and every time such waggon or cart shall be so drawn and pass.

As to the period for watering roads.—By Stat. 3 Geo. 4. c. 126. s. 120, After reciting that by several Acts of Parliament relating to particular turnpike roads, power is given to the trustees to water the roads during certain months in the year, and to take additional tolls on account of the said watering, and the time specified in such Acts has been found in many instances too limited to afford to the public all the advantages which might be derived from watering the said roads;—It is enacted, that whenever an Act or Acts has or have been passed to enable the trustees of any turnpike road or roads to water the same or any part thereof, and to take an additional toll for such watering during a limited time, in the said Act or Acts specified, it shall be lawful for the trustees of the said road or roads, at any general meeting held for that purpose, to order that such part of the said road or roads as by the local Act or Acts relating to the same is allowed or directed to be watered, and a certain

additional toll to be taken for such watering, shall be watered, and the said additional toll for watering the same may be demanded and taken for any time between the 1st day of *March* in every year, and the 1st day of *November* following; and the said trustees shall have, and they are hereby authorized to exercise and enforce all the powers, authorities, remedies, and penalties for collecting the said additional tolls for watering the roads during the time aforesaid, as they now by law have for any other tolls which may be demanded and collected on the said roads.

What shall be deemed the centre of the road.—By *Section 124*, After reciting that doubts may arise as to what is to be deemed the road, or the centre of the road;—It is enacted, that where in this, or any other Act of Parliament relating to turnpike roads, any matter or thing is directed or forbidden to be done within a certain distance of the centre of the road, that portion of ground shall be deemed and taken to be the road, which has been maintained by the trustees as *hard* road, and repaired with stones, gravel, or other materials used in forming roads, for six months immediately preceding any offence committed against such regulations; and the centre of the road shall be the middle of such hard road, where a line being drawn along the road or a point marked, an equal number of feet of hard road which have been so maintained and repaired as aforesaid, for six months before, shall be found on each side of such line or mark:—Provided always, that nothing herein contained shall authorize any person or persons to inclose or make any encroachment on any waste lands or grounds lying on the side of any turnpike road, being part of the highway, and over which the king's subjects have been

used and accustomed to pass ; but every person who shall inclose such waste lands and grounds, or obstruct the right of passage over the same, shall continue and be subject to the same process and penalties as if this Act had not been made.

Power to trustees to order skid-pans to be used with locked-wheels.—By Section 126, It shall be lawful to and for the trustees of every turnpike road, at any meeting to be held for that purpose, on ten days' notice in writing of such meeting being affixed upon the turnpike-gates on the road, and they are hereby authorized and empowered, from time to time as they shall think fit, to order and direct that in all cases, where any waggon or cart shall descend any hill or hills on the said road with either of the wheels locked, a skid-pan or slipper shall be used or placed at the bottom of such wheel during the whole time of its being so locked, in such manner as to prevent the said road from being destroyed or injured by the locking of such wheel ; and it shall be lawful for the said trustees from time to time to repeal, alter, or renew such order as they shall think necessary ;—And whilst any such order so to be made as aforesaid shall be in force, every person who shall drive or act as the driver of any waggon or cart down any hill or hills, with either of the wheels locked, and without using such skid-pan or slipper at the bottom of such wheel, in manner aforesaid, shall, for every such offence, forfeit any sum not exceeding 20s. :—Provided always, that a copy of such order shall be affixed on all the turnpikes standing on such road, for thirty days at least before the same shall be in force.

Power to make causeways ; and to substitute bye-roads during the time of repair, &c.—By Section 111, It shall

be lawful for the trustees to make and keep in repair, or cause to be made and kept in repair, any causeway or causeways for the use of foot passengers in, upon, or on the sides of the turnpike road, in such manner as they shall think proper:—And also to make or cause to be made a road through the grounds adjoining to any ruinous or narrow part of any turnpike road (not being the site or ground whereon any house or houses stand, nor being a yard, garden, park, paddock, planted walk, or avenue to any house, or any inclosed ground planted and set apart as a nursery for trees), to be made use of by all passengers, cattle, and carriages, as a public highway, whilst the old road is repairing or widening, and till such time as it shall be convenient for passengers and carriages to pass along the same, making such recompence to the owners and occupiers of such private grounds for the damages they shall or may thereby sustain, as shall be adjudged reasonable by the trustees of the road under repair or alteration; and in case of any difference concerning such damages between such owners or occupiers and such trustees, then it shall be lawful for any two or more justices of the peace acting in and for the county wherein such grounds shall be situate, on fourteen days' notice in writing being given by either party to the other, to settle, adjudge, and finally determine what recompence shall be made to such owners and occupiers for the damage they shall have sustained as aforesaid.

Trustees not to make or repair paved causeways through any town or village.—By Section 112, Nothing herein contained as to the making or maintaining any causeway or foot-path, or any other matter or provision in this Act, shall extend, or be deemed or construed to extend to authorize or empower any trustees of any

turnpike road to lay down, continue, repair, or maintain any pavement, or any paved or pitched causeway or footpath, in, or upon, or at the side of any turnpike road, within any town, village, or hamlet where such turnpike road shall pass through the same, unless provision shall have been or shall be specially made for that purpose in the Act or Acts of Parliament under which such turnpike roads shall be made, maintained, or repaired; but in default of such provision, all and every such pavement, paved or pitched causeway, or footpath, within such town, village, or hamlet, shall be made, repaired, and maintained, by and at the costs of the inhabitants of such town, village, or hamlet, or by such other persons as shall be in anywise liable to make, maintain, and repair the same.

Regulations as to the maintenance of ditches, drains, &c.
By Sect. 113, Ditches, drains, or water-courses of a sufficient depth and breadth for the keeping all turnpike roads dry, and conveying the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, plats, or bridges shall be made and laid where any carriage-ways or foot-ways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupier or occupiers of such lands or grounds; and every person who shall occupy any lands or grounds adjoining to or lying near such turnpike road through which the water hath used to pass from the said turnpike road, shall and is hereby required, from time to time as often as occasion shall be, to open, cleanse, and scour the ditches, water-courses, and drains, for such water to pass without obstruction: And every person making default in any of the matters or things aforesaid, after ten days' notice to him given,

shall, for every such offence, forfeit any sum not exceeding £5.

By *Section 115*, In all cases, where any gutter, drain, sink, sewer, or under-drain, made or hereafter to be made under or at the sides or near any turnpike road, shall be used as well for the conveyance of the water from such turnpike road, as for conveying water, filth, or other matters from the houses or premises of the inhabitants of any town, hamlet, village, street, or place, and no specific mode of repair, or persons liable to the expences of maintaining the same, shall be appointed, the expence of maintaining and repairing such gutter, drain, sink, sewer, or under-drain, shall be borne and defrayed equally or in proportions by the trustees of such turnpike road and the inhabitants of the town, hamlet, village, street, or place using the same:—And in order to ascertain the proportion, and recover such expences, the surveyor of the turnpike road, under or at the sides or near to which such gutter, drain, sink, sewer, or under-drain shall be situated, shall, as often as shall be requisite, repair the same, and shall then make out an account of the costs and expences of such reparation, and produce the same to any two or more justices of the peace acting for the county where such gutter, drain, sink, sewer, or under-drain, or so much thereof as shall be repaired, shall lie:—And it shall be lawful for the said justices, and they are hereby authorized and empowered to examine the accounts and statements to be produced to them, and to inquire as to the persons using such gutter, drain, sink, sewer, or under-drain, and to proportion the amount to be paid by the trustees of the turnpike road, and by the inhabitants and persons using such gutter, drain, sink, sewer, or under-drain, respec-

tively, and to fix and ascertain the amount of such proportion as they the said justices shall deem just and reasonable to be paid by the said several parties respectively:—And if any person shall neglect or refuse to pay the sum directed by the said justices to be paid by him, the same shall be levied by distress and sale of the goods and chattels of the person so neglecting or refusing, by a warrant under the hands and seals of any two or more justices of the peace acting for the county where such person or persons shall reside.

By *Stat. 4 Geo. 4. c. 95. s. 67*, It shall be lawful for the surveyor and surveyors and such other person and persons as shall be appointed by the trustees of any turnpike road, from time to time to cut, make, or maintain drains or water-courses upon and through any lands lying contiguous to any such road, and also to make ditches in such places and in such manner as such surveyor and surveyors, by order of such trustees, shall judge necessary; and make sufficient fences and barriers, and other erections, on any part or parts of the said road, in order to prevent any rivulet or current of water from flooding the same, as such surveyor or surveyors shall judge necessary; making such satisfaction to the owners or occupiers of such lands so to be used, cut through, or built upon, for the damages which they or any of them may sustain thereby, as such trustees shall judge reasonable; and in case of any difference between such owners or occupiers and such trustees touching such damages, the same shall be finally settled by any two or more justices of the peace for the county in which such road shall lie or be situate (a).

(a) See *Sutton v. Clarke*, 6 Taunt. 29.—1 Marsh. 429, S. C.—and ante, p. 208.

As to the pruning of trees and hedges.—By *Statute 8 Geo. 4. c. 126. s. 116*, It is enacted, That the owners or occupiers of the land next adjoining to every turnpike road shall cut, prune, and trim their hedges to the height of six feet from the surface of the ground; and also cut down, prune, or lop the branches of trees, bushes, and shrubs growing in or near such hedges, or other fences adjacent thereto, (such fences, trees, bushes, or shrubs, not being in any garden, orchard, plantation, walk, or avenue to a house, nor any tree, bush, or shrub, being an ornament or shelter to a house, unless the same shall hang over the road, or any part thereof, in such a manner as to impede or annoy any carriage or person travelling thereon,) in such manner, that the turnpike road shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such turnpike road to the damage thereof:—And if such owner or occupier shall not within ten days after notice given by the surveyor for that purpose, cut, prune, and trim such hedges, or cut down, prune, or trim such branches of trees, bushes, and shrubs in manner aforesaid, it shall be lawful for the said surveyor and he is hereby required to make complaint thereof to some justice of the limit where such turnpike road shall lie, who shall summon the occupier of such lands before him to answer the said complaint; and if it shall appear to such justice that such occupier has not complied with the requisites of this Act in that behalf, it shall be lawful for such justice, upon hearing the surveyor and occupier of such land, or his agent, (or in default of his appearance, upon having due proof of the service of such summons,) and considering the circumstances of the case, to order such hedges to be cut, trimmed, and pruned, and such branches of trees, bushes, and shrubs to be cut down, or pruned, or trimmed, in

such manner as may best answer the purposes aforesaid : And if the occupier of such lands shall not obey such order within ten days after it shall have been made, and he shall have had due notice thereof, he shall forfeit the sum of 2*s.* for every twenty-four feet in length of such hedge which shall be so neglected to be cut, trimmed, and pruned, and the sum of 2*d.* for every tree, bush, or shrub which shall be so directed to be cut down, pruned, or trimmed:—And the surveyor, in case of such default made by the occupier, shall and he is hereby required to cut, prune, and trim such hedges, and to cut down, prune, or trim such branches of trees, bushes, and shrubs, in the manner directed by such order ; and such occupier shall be charged with and pay, over and above the said penalties, the charges and expences of doing the same, or in default thereof, such charges and expences shall be levied, together with the said forfeitures, upon his goods and chattels, by warrant from a justice of the peace, in such manner as is authorized for forfeitures incurred by virtue of this Act (*a*).

But by *Section 117*, No person shall be compelled, nor any surveyor permitted, by virtue of this Act, to cut or prune any hedge, at any other time than between the last day of *September* and the last day of *March*.

As to the erection of mile-stones, &c.—By *Section 119*, The said trustees shall cause stones or posts to be set up or placed in or near the sides of every turnpike road, at the distance of one mile from each other, denoting the distance of any and every such stone or post from any town or place ; and also such direction-post at the several

(*a*) By s. 141. See post, Chapter VI. Section III.

roads leading out of any such road, or at any crossings, turnings, or terminations thereof, with such inscriptions thereon denoting to what place or places the said roads respectively lead, of such height or size, and to be erected in such situations as they the said trustees shall think proper; and also to cause to be painted in legible characters, on some wall or board at the entrance of every town or village, the name of such town or village; and shall also cause stones to be put up marking the boundaries of parishes where any such boundaries shall cross any turnpike road; and from time to time to repair or renew such stones, posts, and boards, and keep and continue legible the inscriptions on such stones, posts, walls, and boards respectively:—And if any person shall wilfully break, cut down, pull up, or damage any such posts, stones, or boards, or shall obliterate, deface, spoil, or destroy all or any of the letters, figures, or marks, which shall be inscribed or painted thereon, or on any such walls, and be thereof convicted before any justice of the peace for the county where such offence shall be committed, by the confession of the party, or by the oath of one credible witness, such person so offending shall forfeit and pay any sum not exceeding £10 for every such offence.

Power to administer oaths.—By Stat. 3 Geo. 4. c. 126. s. 146, Where any oath or affirmation is by this or any Act relating to turnpike roads required and directed to be made or taken, the justices of the peace of any county or place, or the trustees of any turnpike road, (as the case may be,) and according to the several jurisdictions herein given to them respectively as aforesaid, shall, and they are hereby respectively empowered to administer the same.

newly-erected bridge shall be repaired by the public, or by the individual who has built it. The following cases, however, tend to explain this part of the subject, in perfect consistency with the principles which, in this respect, regulate highways in general.

Lord Coke says (*a*), If a man make a bridge for the common good of all the subjects, he is not bound to repair it: for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription.

The public benefit, then, is the grand criterion. If a man erect an useless or a mere ornamental bridge, neither he nor the public are bound to maintain it. Also if the bridge is principally for the benefit of its founder, and is only collaterally of service to others, the public incur no liability with respect to it. But where it is of general utility, the public who reap the benefit, ought to sustain the burthen of repairing it.

Thus in *Rex v. The West Riding of Yorkshire* (*b*), which was an indictment for not repairing a public bridge called *Glusburne* Bridge, it appeared, that there was an ancient foot-bridge, which the inhabitants of Glusburne had always repaired. They, being desirous of having a bridge for carts and carriages, applied to the General Quarter Sessions, and a contribution was granted towards building a new bridge; but the order provided that nothing therein contained should extend to charge the inhabitants of the said riding, in time to come, with the reparation of the said intended bridge. The inhabitants of Glusburne built the bridge in question, which was of public

(*a*) 2 Inst. 701.

(*b*) 5 Burr. 2594.—2 Black. 685, 8. C.

utility, and was afterwards used constantly by all persons. The ancient bridge stood about sixty yards below the new bridge in the same highway. And the Court held, that the new bridge was for the common benefit and utility of the county; and therefore came within the rule, "that if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it." The common law therefore attached upon this bridge; and the county ought to repair it.

In the above case, 1 *Roll. Ab.* 368, *Bridges*, pl. 2, was cited, *arguendo*, which is, that if a man erects a mill for his own profit, and makes a new cut for the water to come to it, and makes a new bridge over it, and the subjects are to go over this as over a common bridge; this bridge ought to be repaired by him who has the mill, and not by the county; *because he erected it for his own benefit* (a). This case, Mr. Justice Aston in giving judgment did not deny, but endeavoured to distinguish it from the one then before the Court. The principle however there laid down, appears to be completely opposed to the decision in *Rex v. The Inhabitants of the County of Glamorgan* (b), where the defendants pleaded to an indictment for not repairing a public bridge, that H. M. esq. being seised of certain tin works, *for his private benefit and utility*, and for making a commodious way to his tin works, erected the bridge; and that he and Sir H. M. his son, and their tenants enjoyed a way over the bridge for their private benefit and advantage, and therefore that

(a) See a full account of this case, taken from the record, as given by Lord Ellenborough, in *Rex v. The Inhabitants of Kent*, 2 M. & S. 513, whereby it appears,

that no such question as supposed by Lord Rolle was ever directly or indirectly decided, or could properly be in question.

(b) 2 East, 356, note.

Sir H. M. ought to repair. Upon the trial before Lord Kenyon, the facts alleged in the plea were proved; and also that the business of the tin works could not be carried on without the use of the bridge. But it also appearing, that the public had constantly used the bridge from the time of its being built, his Lordship directed the jury to find a verdict for the Crown, viz. that the inhabitants of the county were bound to repair; which they did accordingly; and the verdict was never disturbed.

In *Rex v. The Inhabitants of the County of Bucks (a)*, the defendants were indicted for not repairing a bridge called *Datchet Bridge*. They pleaded specially, and were found guilty, subject to the opinion of the Court upon a case, stating that Queen Anne, for her greater convenience in passing to and from Windsor Castle, built a bridge over the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, where she kept boats for the public accommodation and received tolls. She and her successors repaired the bridge till 1796, when, it having in part fallen in and become impassable, the whole was removed, and the materials converted to the use of the king, who re-established the ferry. The question was, whether this was a public bridge so as to render the defendants liable to repair and rebuild? And the Court held that, being situate in a principal highway, and used, as it so long was, for all persons as a public bridge, and being also of great public use and convenience, it was a bridge repairable by the county. Lord Ellenborough, C.J. in the course of an elaborate argument on giving judgment, observed, "None of the cases cited profess to give an immediate definition

(a) 12 East, 192.

or description in terms of what shall be considered public bridges; although a distinction between a public and a private bridge is taken in *2 Inst.* 701, and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private purposes; and the instance put of a private bridge is a 'bridge to a mill which A. was bound to maintain, over which B. had passage.' And the words themselves, *i. e.* 'public bridges' do not occur in the *Stat.* of 22 Hen. 8. c. 5, called the Statute of Bridges. But the sense of these words may be very distinctly inferred from that statute, which empowers the justices of peace in their General Sessions to inquire of 'all manner of annoyances of bridges broken in the highways,' and applies to bridges of that description in all its subsequent provisions; and amongst others, that, which casts upon shires and ridings the repair of bridges situate within them (and without any city or town corporate,) where it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain or body politic ought of right to make *such* bridges decayed, *i. e.* *such bridges broken in highways*. Inferring therefore from the statute that a bridge in a highway is a public bridge for all purposes of repair connected with the Statute of Bridges, we have only to refer to the case before us to see whether this be a bridge in a highway." And his Lordship afterwards says, "If the meaning of the words, *public bridge*, could properly be derived from any other less authentic source than the statutable one I have mentioned, they might safely be defined to be such bridges as all his Majesty's subjects had used freely and without interruption as of right, for a period of time competent to protect them, and all who should thereafter use them, from being considered as wrong-doers in respect of such use in any

mode of proceeding, civil or criminal, in which the legality of such use might be questioned (a)."

In accordance with the two last cases, where a person about forty-five years back erected a mill and dam thereto for his own profit, *per quod* he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller, about five years afterwards, built a bridge over it, and there was no doubt that the public had since used it; but it was admitted that the miller had repaired the bridge: The Court of K. B. held, that the county and not the miller were chargeable with the reparation, according to the case cited by *Northey*, Attorney-General, in *Rex v. The Inhabitants of Wilts*, 1 Salk. 359, that if a private person build a private bridge, which afterwards becomes of public convenience, the county is bound to repair it (b).

In the case of *Rex v. The Inhabitants of the West Riding of Yorkshire* (c), the defendants were indicted for non-repair of a public bridge; and the indictment stated the bridge to be situate upon a rivulet, in a public highway. The defendants pleaded, that after the making of a certain Turnpike Act, the said bridge was first made by order of certain trustees in that Act named, in pursuance of the directions and for the purposes in the same Act contained, upon the said road in the said Act mentioned; and that no bridge had ever been there before that time erected. To this plea the plaintiffs demurred.

(a) Compare this with the definition of a highway, ante, Chapter I.

(b) *Rex v. The Inhabitants of Kent*, 2 M. & S. 513.

(c) 2 East, 342.

After a long and able argument, the Court of K. B. gave judgment in favor of the Crown. Lord Ellenborough, C.J. laying down with great clearness the principles that govern cases of this nature. "By the common law," he observes, "counties are chargeable with the repair of public bridges; unless it be shewn, as the *Stat. 22 Hen. 8. c. 5*, says, what persons, lands, tenements, and bodies politic ought to make and repair such bridges. In the absence of such proof, that burthen is, by the operation of the common law, thrown on the inhabitants of the county in which the bridge lies. But in order to effect this, it is not enough that a new bridge shall be built in a highway used by the public; it must also be useful to the public; but enough is stated to shew that; the bridge being alleged to be in a public highway, and used for all the king's subjects: it is at least sufficient to throw the *onus* upon the inhabitants of the county, of shewing who else is bound to the repair, if they be not. I do not lay stress on the idea, of the public having adopted the bridge by passengers going over it; because if it occupy the highway, they cannot help using it. I only rely on the using of it so far as to shew, that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If, however, it be built in a slight or inconvenient manner, no person can, at his choice, impose such a burthen on the county; and it may be treated altogether as a nuisance and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the act; and the bridge becoming of public benefit, the burthen of repair ought properly to fall upon the public. The rule laid down by Mr. Justice Aston, in the *Glusburne Bridge* case, seems to be the true one, 'that if a man build a bridge, and it become *useful* to the county in general,

‘the county shall repair it.’ He says nothing about the adoption of it by the public; and there is good sense in not relying on that, *except as evidence* of its being a public bridge, and of utility to the public. Where it is stated to be used by the public, it cannot be presumed to be useless to them: but if intended to be objected to on the ground of inutility, it must be so stated in the plea.”

The different degree of evidence, then, which is required to prove the benefit arising to the public, is the reason of the whole distinction between a bridge and a common highway. The passage along a highway is purely voluntary; if therefore, it be traversed by the public, that is decisive evidence that they enjoy an advantage from the use of it. For the same reason a way which is no thoroughfare, cannot be a highway, for it can never be of general utility. But the erection of a bridge in a highway may, according to circumstances, be either detrimental or beneficial. And the *user* of it by the public, is matter, not of choice, but of necessity. The proof, therefore, which establishes the utility in the first case, can never have the same effect in the other; and further evidence is necessary (*a*). But the conclusion to be supported is in both instances the same.

When a bridge is built under the authority of an Act of Parliament, the sanction of the Legislature is *prima facie* evidence of the beneficial nature of the bridge. Thus in the above case of *Rex v. The Inhabitants of the West Riding of Yorkshire* (*b*), Lawrence, J. remarked, “When we observe that the bridge was erected by

(*a*) See *Rex v. The Inhabitants of the County of Northampton*, 2 M. & S. 262.
 (*b*) See 2 East, 352.

trustees of a turnpike road, appointed by an Act of Parliament, we cannot suppose that it was erected for other purposes than for the public utility."

Where, however, a bridge, although erected under the provisions of an Act of Parliament, is made for the furtherance of private schemes, and may be said to be in the nature of a *compensation* to the public for damage done to their highway, in such a case, upon evidence to rebut the *prima facie* presumption of public utility, arising out of the concurrence of the Legislature, the party who built shall also be obliged to maintain the bridge.

Thus, where the Company of Proprietors of the Navigation of the River Medway, under the authority of an Act of Parliament (16 & 17 Car. 2.) deepened a particular spot in the bed of the River Medway, which spot had before that time been fordable by foot passengers, but afterwards in consequence of such deepening, became impassable for foot, and almost for horses. Upon threat of an indictment for the destruction of the highway across the ford, the company, in 1767, built a bridge, and repaired it till its destruction by a flood. The same Act which empowered them to cleanse, scour, dig, widen, and make navigable the said river, also empowered them to amend or alter such bridges or highways as might hinder the said passages or navigation (*leaving them, or others as convenient in their room*). It was held, that the company, and not the county, were bound to rebuild and keep in repair the bridge. And *per* Lord Ellenborough, C. J. "The power given to the company to take or alter the old highway was upon condition of leaving another passage as convenient in its room; and

if they do not perform the condition, they are not entitled to do the act; it is a continuing condition, and when the company thought proper, for their own benefit, to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public" (a).

And upon the same principle, where an Act authorized and empowered the proprietors of a navigation to make cuts near to the side of the River Bain, to straighten its course, and erect upon the same so many bridges as they should think requisite for the purposes of the Act, and from time to time to alter, repair, and amend, or discontinue the same or any of them: It was held that the company were liable to keep in repair a bridge which had been built by them over a cut made through a highway, for the purposes of the Act. *Per* Lord Ellenborough, C. J. "The Act authorizes the company not only to alter, repair, and amend, but even to *discontinue* any of the works before authorized to be erected; amongst others, any bridge. And the inhabitants of a county can never have, by law, a permanent burthen thrown upon them to repair a bridge, of which they have not the permanent use and enjoyment secured to them." And Le Blanc, J. said, "The authority given to the company to make the cut, which rendered the highway impassable without a bridge, must create an obligation in them to erect the bridge, though the word *authorize* in the Act would not of itself create the obligation" (b).

(a) *Rex v. The Inhabitants of the County of Kent*, 13 East, 220.

(b) *Rex v. The Inhabitants of the Parishes of Lindsey, in the County of Lincoln*, 14 East, 317.

The observation of Le Blanc, J. in the last case, that even were nothing said in the Act about building the bridge, yet its erection and reparation is required by law from the proprietors, as a compensation to the public, is fully confirmed in the case of *Rea v. Kerrison* (a). Here the Act empowered the commissioners for making navigable the River Waveney to cut, dig, or use the ground or soil of any persons for the making, enlarging, straightening, or altering the channels of the river, or for making any new channel, &c. but was silent with respect to bridges or other such erections. By virtue of this Act, the commissioners cut through a highway and rendered it impassable, and a bridge was built over the cut along which the public passed, and which had been repaired by the proprietors of the navigation. The Court of K.B. held that the proprietors, and not the county, were liable to repair. And *per* Lord Ellenborough, C. J. "The undertakers of this navigation have a duty, as it seems to me, arising out of the execution of their own powers under the Act. The Act enables them to cut new channels as occasion should require, and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge." And Le Blanc and Bayley, Justices, observed, That although the proprietors had a right to make a cut through the highway, and so far were not wrong-doers; yet if they had left it so, they would have been wrong-doers, and might have been indicted, and charged with cutting across the highway, and if they had pleaded the Act of Parliament, the Court would have determined upon it, that they had power only to make the cut *sub modo*, that is, providing a substitute to the public.

(a) 3 M. & S. 526.

There may be a limited, though it should seem not a *partial* dedication of a bridge to the public use (a). This is best illustrated by the following case :—Where a bridge was used by the public at all times, with foot and with horses, but only occasionally with carriages, except in times of flood or frosts, when it was unsafe to pass through the river, at which times carriages always passed over the bridge, and in ordinary times the carriage road went through the ford, and the bridge was sometimes barred against carriages, by means of a post and chain, which was locked :—It was held that this was a public bridge, with a right of passage, though limited in extent, yet absolute in right (b).

By *Stat.* 43 Geo. 3. c. 59. s. 5, For the more clearly ascertaining the description of bridges *hereafter to be erected*, which inhabitants of counties shall be liable to repair and maintain, It is enacted, That no bridge hereafter to be erected or built in any county, by or at the expence of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor or person appointed by the justices of the peace at their General Quarter Sessions assembled, or by the justices of the peace of the county of Lancaster, at their Annual General Sessions; and

(a) See ante, p. 50, *et seq.* for some observations as to the possibility of there being a partial dedication of a highway.

(b) *Rex v. The Inhabitants of the County of Northampton*, 2 M. & S. 262.

which surveyor or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same; and in case the said party or parties shall be dissatisfied, the matter shall be determined by the said justices respectively at their next General Quarter Sessions, or at their Annual General Sessions in the county of Lancaster.

But by the 7th *Section*, It is provided, That nothing herein contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure, or by prescription, or to alter or affect the right to repair such bridges or roads.

As the freehold of highways in general is vested in the adjoining proprietors or the lord of the manor, and not in the public, so the freehold of bridges is in him that hath the freehold of the soil; but the free passage is for all the king's liege people (a).

In *Harrison v. Parker and another* (b), which was an action of Trespass for taking and carrying away the plaintiff's goods, to which the defendants pleaded, Not Guilty; it appeared that the plaintiff, being lord of a manor, had contracted with one who was lord of an adjoining manor, for himself and his heirs, for liberty and licence to build a bridge over a river which divided the two manors, with liberty to lay the foundations in the close of the lordship, together with the free use for the plaintiff, &c. and all other persons to and from a certain town or parish, of a

(a) 2 Inst. 705.

(b) 6 East, 154.

sufficient carriage road to and from the said new bridge; the said bridge to be kept in repair by the plaintiff and his heirs, and also a road (describing it) on each side thereof; and that the said bridge and roads should for ever be public highways, not subject to any toll. The bridge was built; the defendants took down a part of it, and carried away the stones for their own use. And it was held by the Court, that a qualified property subsisted in the plaintiff after the dedication of the bridge to the public, which, upon the severance of the materials, became an absolute right of property in him; and that, therefore, the plaintiff might, as against a wrong-doer, maintain this action. That all which was granted to the public was a right of passing over these materials in the form of a bridge; when they ceased to be a part of the bridge, they reverted to the plaintiff, discharged of the public easement.

SECONDLY: *As to the liability to repair a public bridge.*

For the purpose of explaining this branch of the subject, it may be advantageous to discuss, 1st, The common law liability to repair, and the statutory enactments for the regulation thereof: 2dly, The liability to repair by reason of tenure or prescription: 3dly, The reparation by the county of 300 feet of the highway at the ends of the bridges: and 4thly, The indictment, &c. for non-repair of public bridges.

I. The common law liability to repair; and the statutory enactments for the regulation thereof.

1st. The common law liability.

By the *Great Charter* (9 Hen. 3. c. 15.), No town nor freeman shall be distrained to make bridges nor banks, but such as of old time, and of right have been accustomed. And none can be compelled to make new bridges, where never any were before, but by Act of Parliament (*a*).

Of common right the charge of repairing all common bridges lies upon the county wherein they are, unless part thereof be within a franchise; in which case it is said, that so much as is within the franchise shall be repaired by those of the franchise (*b*).

It seemeth to be clear, that those who are bound to repair such bridges, must make them of such height and strength, as shall be answerable to the course of the water, whether it continue in the old channel or make a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying thereon the materials requisite for such repairs (*c*).

The common law imposes no obligation to *widen* bridges which are too narrow for the convenient use thereof by the public. In one case, indeed, the Court strongly in-

(*a*) 2 Inst. 701.

and 1 Inst. 701.

(*b*) 1 Hawk. P. C. c. 77. s. 1,

(*c*) 1 Hawk. P. C. c. 77. s. 1.

timated, that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burthen of widening it must be borne by those who are bound to repair the bridge. And Lord Kenyon, C. J. in giving judgment, said, "That upon this question there could not be entertained much doubt" (*a*). However, where the same case came, by Error, before the House of Lords, the Lord Chancellor (*b*), expressed great doubts whether the persons who are bound to repair a bridge, are also bound to widen it, if the exigencies of the public should so require (*c*). And this opinion expressed by Lord Eldon, has recently been confirmed in the case of *Rex v. The Inhabitants of the County of Devon* (*d*), where it is decided, that there is no obligation at common law to widen a bridge. For as a county is not bound to make a bridge, it is not bound to widen one: *quoad* the addition that would be a making, because the addition beyond the existing width would be *pro tanto* a new bridge. Besides, the county has not the means of widening a bridge; they cannot, at common law, compel the sale of land or houses, or other private interests; and they have no right to expend the public money for such a purpose; if, therefore, they have not the power to widen a bridge, it affords a strong presumption that they are not bound to do it.

By *Statute* 22 Hen. 8. c. 5. s. 2 & 3, which is declarative of the common law, "Whereas in many places it

(*a*) *Rex v. The Inhabitants of Cumberland*, 6 T. R. 194.

(*b*) Lord Eldon.

(*c*) *The Inhabitants of Cumber-*

land v. The King, In Error, 3 Bos. & Pul. 354.

(*d*) 4 B. & C. 670.

cannot be known and proved what hundred, &c. town, parish, person, or body politic, ought to repair bridges broken in the highways; in every such case, the said bridges, if they be without a city or town corporate, shall be made by the inhabitants of the county; if within a city or town corporate, then by the inhabitants of such city or town corporate; if part be in one shire, city, or town corporate, and part in another, or part within the limits of a city or town corporate, and part without, the inhabitants of the shire, cities, or towns corporate shall repair such part as lies within their limits."

This extendeth only to common bridges in the king's highways, and not to private bridges to mills, or the like; the remedy in which case is not by indictment, but by action (*a*).

It hath been questioned, whether a borough, which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge (*b*).

Lord Coke says (*c*), in his commentary upon this Act, "The persons to be charged by this Act are comprehended under the word *inhabitants*; which word, being the largest word of the kind, is needful to be explained.

"1st. Although a man be dwelling in an house in a foreign county, city, or town corporate, yet if he hath lands in his own possession and manurance in the county, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands in his own possession.

(*a*) 2 Inst. 701.

P. C. c. 77. s. 25.

(*b*) 1 Keb. 68. See 1 Hawk.

(*c*) 2 Inst. 702.

"2dly. If a man dwelleth in a foreign shire, city, or town corporate, and keepeth a house and servants in another shire, city, or town corporate, he is an inhabitant in each shire, city, or town corporate within this statute.

"3dly. *Ex vi termini*, every person that dwelleth in any shire, city, or town corporate, though he hath but a personal residence, yet he is said in law to be an inhabitant, or a dweller there, as servants or the like; but this Statute extendeth not to them, but to such householders who may be distrained for non-payment: and it would be infinite and impossible to tax every inhabitant being no householder.

"4thly. Every corporation and body politic residing in any county, city, or town corporate, or having lands or tenements in any county, city, or town corporate, which they keep in their own hands and occupation, are said to be inhabitants there, within the purview of this Statute.

"5thly. An infant, that hath house or lands by descent or purchase, is liable to the public charge; and so is the husband of a *feme covert*."

It seems that if a foot or horse bridge, to the repair of which an individual is liable by tenure or prescription, be enlarged to a carriage bridge, in such a case the future reparation thereof shall be made, as to the new part by the county, and as to the old part thereof by the individual, *pro rata* (a).

By *Stat. 12 Geo. 2. c. 29. s. 1*, The charges of repairing and amending bridges, and highways at the end of bridges, shall be paid out of the general county rates (b).

(a) *Rex v. The Inhabitants of the West Riding of Yorkshire*,

2 East, 353, note.

(b) See 52 Geo. 3. c. 110, post.

2dly. The statutory enactments for regulating the repair of bridges.

Appointment of Surveyors.—By Stat. 22 Hen. 8. c. 5. s. 4, The justices of peace within the shires or ridings wherein such decayed bridges be, out of cities and towns corporate; and if it be within cities or towns corporate, then the justices of peace within every such city, &c. or four of them at the least (one whereof is of the *quorum*) within the limits of their commissions and authorities, shall have power to name and appoint two surveyors, with salaries, to see the bridges amended.

And this business of surveying the bridges, for the more convenience, is usually annexed by the justices to the office of the high constables; for which they have by this clause power to allow them salaries.

Provisions for procuration of materials and removal &c. of nuisances, under the Highway Act, extended to county bridges.—By Stat. 43 Geo. 3. c. 59. (called Lord Gower's Act,) After reciting, That the inhabitants of counties in England, are by law bound to repair, support, and maintain the public bridges, commonly called county bridges, within such counties respectively, and the roads at each of the ends thereof for limited distances; but the laws empowering them so to do are insufficient and defective; And that doubts have arisen how far the said inhabitants are liable to improve such bridges when they are not sufficiently commodious for the public; It is enacted, That it shall be lawful to and for the surveyor of bridges and other public works, in each and every county respectively within England, appointed or

to be appointed by the justices at any General Quarter Sessions of the peace to be holden for such county, and the said surveyor is hereby authorized and empowered to search for, take, and carry away gravel, stone, sand, and other materials for the repair of such bridges and roads at the ends thereof, as the inhabitants of counties are bound to repair; and to remove obstructions and annoyances from such bridges and roads, in such and the same manner as the surveyor or surveyors of any common highway within this kingdom, is or are by *Stat. 13 Geo. 3. c. 78*, authorized to do:—And the several powers and authorities thereby vested in the surveyor or surveyors of highways, as well for the getting of materials as the preventing and removing of all nuisances and annoyances from such bridges and roads, shall be, and the same are hereby vested in the surveyor and surveyors of county bridges and the roads at the ends thereof as aforesaid; and the several penalties, forfeitures, matters, and things, in the said Act contained, relating to highways, shall be, and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, as fully and effectually as if the same and every part thereof were herein repeated and re-enacted; the said surveyor or surveyors making satisfaction and compensation for all trespass and damage done in the execution of the powers of this Act, in such and the same manner as the surveyors of highways are required to make in and by the said Act of the 13 Geo. 3, c. 78.

Right of property, &c. vested in surveyor.—And by *Sect. 3*, The right and property of all tools, implements, timber, bricks, stones, gravel, and other materials, purchased, gotten, or had, or to be purchased, gotten, or had

by or by the order of justices in counties, or the surveyor of county bridges for the time being, or in any respect belonging to such counties, shall be vested in such surveyor for the time being; in whom, upon any action or indictment being commenced or prosecuted, such property may be laid.

This Act not to extend to bridges repairable by prescription.—By Section 7, It is provided, That nothing herein contained shall extend to any bridges or roads, which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure, or by prescription, or to alter or affect the right to repair such bridges or roads.

The above Act to extend to bridges repairable by hundreds, and other general divisions.—And by Stat. 54 G. 3. c. 90. s. 2, All the powers and provisions of Stat. 43 G. 3. c. 59, (except as to bridges thereafter to be erected) are extended, as well to bridges and the roads at the ends thereof repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof repaired by the inhabitants of counties.

Power to obtain stone from quarries, upon making satisfaction. In case of dispute the amount to be settled by a jury.—By Stat. 55 Geo. 3. c. 143, s. 1, After reciting the above-mentioned provisions of the Statutes 43 Geo. 3. c. 59. s. 1, and 54 Geo. 3. c. 90, and that it is expedient, that surveyors of county bridges and other persons, being under contract for the rebuilding or repairing such bridges, or bridges repaired by the inhabitants of hundreds and other general divisions of counties in the nature of hun-

dreds, should have a more extended power for procuring materials than is at present vested in such surveyors of county bridges, by the operation of the said first recited Act, so far as relates to the procuring of stone for such purposes from quarries;—It is enacted, That it shall be lawful for every surveyor of such bridges in each and every county within England, appointed or to be appointed by the justices at any General Quarter Sessions of the peace to be holden for such county; and also for the bridge-master or all and every persons or person who may, at the passing of this Act, or from and after the passing thereof, be under contract for the rebuilding or repairing of any public bridge, built or repaired at the expence of the inhabitants of any such county, hundred, or general division as aforesaid; and such surveyor and surveyors, and also such other person or persons, are hereby authorized and empowered, with the consent and by the order of two justices of the peace, acting for the county in which such bridge is intended to be rebuilt or repaired, first had and obtained for that purpose, to search for, work, dig, get, and carry away any stone in, from, or out of any quarry or quarries whatsoever within the county or counties to which such bridge may belong (other than and except such quarries as may be situated within a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or as may now or hereafter have ornamental timber trees growing thereon,) without the licence or consent of the owner or owners of such quarry or quarries, as such surveyor or other person or persons shall judge necessary for the rebuilding or repairing of such bridges respectively; provided such quarry or quarries shall have been worked within the last three years preceding the time when such bridge shall be about to be rebuilt or repaired:—The said surveyor or other per-

son or persons making such satisfaction and recompence for the value of such stone, and also for the damage to be done to such quarry or quarries by the getting and carrying away the same, as shall be agreed upon between him or them, and the owner, occupier, or other person interested in such quarry or quarries respectively:—And in case they cannot agree, or such owner or occupier or other person interested shall refuse to treat, then and in every such case the justices of the peace at their General or Quarter Sessions, or any two or more of them appointed for that purpose, fourteen days' notice having been given to the owner or his agent of the intention to require a jury, shall cause the value of such stones and amount of such damage to be inquired into and ascertained by a jury of indifferent men of the county, riding, division, city, town, liberty, or precinct wherein the same shall be situated; and to that end shall summon and call before such jury, and examine upon oath (which oath any two or more of such justices of the peace is and are hereby empowered to administer) any person or persons whomsoever; and such justices of the peace, or any two of them, shall, by ordering a view or otherwise, use all ways and means for the information of themselves and of such jury in the premises; and when such jury shall have inquired of and ascertained the value of such stones and amount of such damage, the said justices of the peace shall thereupon order that the sum or sums, which shall so appear to be the value of such stones and amount of such damage, shall be paid; which verdict or inquisition and order shall be filed of record by the clerk of the peace, or other officer having the custody of the records of the said county, riding, division, city, town, liberty, or precinct, and shall be final and conclusive to all intents and purposes whatsoever against all parties and persons whom-

soever, claiming or to claim in possession, remainder, reversion, or otherwise, their heirs and successors, as well absent as present, infants, lunatics, idiots, and persons under coverture or any other disability whatsoever, corporations, guardians, committees, husbands, trustees, and attornies, or any other person or persons whomsoever.

Power to summon a jury accordingly.—By Section 2, For the summoning and returning such juries, such justices of the peace, or any two of them, may issue their warrant or warrants to the sheriff or bailiff of any particular county, riding, division, city, town, liberty, or precinct, within the limits of which the quarry or quarries shall be situated, requiring him to impanel, summon, and return an indifferent jury of twenty-four persons, qualified to serve on juries, to appear before the said justices, or any two of them, at such time and place as in such warrant or warrants shall be appointed; and such sheriff or bailiff is and are hereby required to impanel, summon, and return such number of persons accordingly; and out of the persons so impanelled, and returned, or out of such of them as shall appear upon such summons, the justices of the peace, or any two of them shall, and they are hereby empowered and required, to draw by ballot, and to swear or cause to be sworn, twelve men, who shall be the jury for the purposes aforesaid; and in default of a sufficient number of jurymen so returned, the said sheriff or bailiff shall take such other honest and indifferent men of the by-standers, or that can be speedily procured to attend that service, to make up the number of twelve; and all persons concerned shall have their lawful challenges against any of the said jurymen when they come to be sworn:—And the said justices of the peace, or any two of them,

shall have power from time to time to impose a fine or fines on such sheriff or bailiff, or his deputy or deputies, making default in the premises, and on any of the persons who shall be summoned and returned on such jury and who shall not appear, or appearing shall refuse to be sworn on the said jury, or being sworn, shall refuse to give or shall not give a verdict, or shall in any other manner wilfully neglect his or their duty therein, and also on any person who, being summoned and required to give evidence before the said jury, shall refuse or neglect to appear, or appearing shall refuse to be sworn, or to give evidence, so that no such fine be more than £10 nor less than 20s. on any person for one offence.

As to the payment of expences.—And by *Section 3*, In case any jury shall give in and deliver a verdict for more money, as the value of such stones and amount of such damage, than what shall have been offered for the purchase thereof by such surveyor or other person or persons as aforesaid, the costs and expences of summoning and maintaining the jury and witnesses shall be borne and paid out of the rates to be collected within such county respectively;—but if such jury shall give in and deliver a verdict for no more or for less money, than the money which shall have been so offered by such surveyor or other person or persons as aforesaid, then the costs and expences of summoning and maintaining the said jury and witnesses shall be borne and paid by the person or persons with whom such controversy or dispute touching the value of such stones and amount of such damage shall arise; and shall be levied, by the warrant of one of the said justices, by distress and sale of the goods and chattels of the person or persons made liable to the payment thereof.

Power of Appeal to the Quarter Sessions.—But it is by *Section 4*, provided, That if any person shall think himself aggrieved by any thing done in pursuance of this Act, such person may, within the space of three calendar months next after the cause of complaint shall have arisen, appeal to the justices of the peace at any General Quarter Sessions of the peace, to be holden for the limit wherein the cause of complaint shall arise, every such appellant first giving fourteen days' notice at least in writing of his intention to bring such appeal, and of the cause or matter thereof, to the person or persons against whom such complaint shall be made, and within three days next after such notice entering into a recognizance before some justice of the peace, acting for the county wherein the cause of complaint shall arise, with two sufficient sureties, conditioned to try such appeal, and to abide by the order of and pay such costs as shall be awarded by the justices at such Session aforesaid; and the said justices at such Session, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the cause and matter of every such appeal in a summary way, and make such award to the party appealing or appealed against, as the said justices shall think proper; and the determination of such justices so assembled shall be binding and conclusive to all intents and purposes.

Power to alter the situation of, or widen county bridges. The defects in the laws for repairing and rebuilding county bridges, by enabling the justices at Sessions to purchase lands under certain circumstances for such purposes (which was in some degree supplied by *Statute 14 Geo. 2. c. 33. s. 1.*) are more completely remedied by *Statute 43 Geo. 3. c. 59*, by *Section 2*, of which Act, It

is enacted, That where any bridge or bridges, or roads at the ends thereof, repaired at the expence of any county, shall be narrow and incommodious, it shall be lawful for the said justices, at any of their General Quarter Sessions, to order and direct such bridge or bridges, and roads to be widened, improved, and made commodious for the public; and where any bridge or bridges repaired at the expence of any county, shall be so much in decay as to render the taking the same wholly down necessary or expedient, it shall be lawful for the said justices, at any of their said General Quarter Sessions, to order and direct the same to be rebuilt either on the old scite or situation, or on any new one more convenient to the public, contiguous to or within 200 yards of the former one, as to such justices shall seem meet:—And if for the purpose of altering the situation, or of widening or enlarging any such bridge or bridges, road or roads, as aforesaid, it shall be necessary to purchase any land or ground [or, by *Statute* 54 Geo. 3. c. 90, “ any building or buildings, or other erections,”] it shall be lawful for such county surveyor or surveyors, by and under the direction of such justices, at their General Quarter Sessions as aforesaid, to set out and ascertain the same, not exceeding in the whole one acre at any one such bridge as aforesaid, and to contract and agree with the owner or owners of such land and persons interested therein, for the purchase thereof, either by a sum in gross, or by an annual rent, at the option of such owner or owners:—And if the said surveyor or surveyors cannot agree with the said owner or owners for the purchase thereof, or the recompence to be made for the same, or by reason of such owner or owners not being to be found, shall be prevented from treating, then and in every such case, the said justices in their General Quarter Sessions shall impanel a jury, and assess the

compensation and satisfaction for such land, and for the trespass and damage to be done by the execution of the powers of this Act, in the same manner as they are authorized and empowered to do by the said above-mentioned Act of the 13 Geo. 3. c. 78, in relation to highways; and all and every the clauses, powers, provisions, exemptions, penalties, matters, and things, in the said Act contained, as well with respect to impannelling juries, examining and swearing witnesses, payments of expences, enabling bodies politic, corporate, and collegiate, and other incapacitated persons to sell and convey, and all other the powers and provisions of the said Act, shall be, and the same are hereby extended and applied to the works by this Act authorized to be done and performed, as far as the same are applicable, as fully and effectually, to all intents and purposes, as if the same were herein particularly repeated and re-enacted:—Provided, that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the Statutes made and now in force concerning public bridges.

All actions, &c. to be brought by or against the surveyor.—By Section 4, The inhabitants of counties shall and may sue for any damages done to bridges and other works maintained and repaired at the expence of such counties respectively, and for the recovering of any property belonging to such counties in the name of their surveyor, and also shall and may be sued in the name of such surveyor:—And no action or prosecution to be brought or commenced by or against the inhabitants of counties, by virtue of this Act, in the name of the said surveyor,

shall abate or be discontinued by the death or removal of such surveyor, or by the act of the surveyor without the consent of the justices at their General Quarter Sessions, but the surveyor for the time being shall be deemed the plaintiff or defendant in such actions, as the case may be:—Provided, that every such surveyor in whose name any action or suit should be so commenced, prosecuted, or defended, shall be reimbursed and paid out of the monies in the hands of the treasurer of the public stock of such county respectively, all such costs and charges as he shall be put unto or become chargeable with, by reason of his being so made plaintiff or defendant therein; and also all the costs and charges of prosecuting any indictment or indictments, or other proceedings against any person or persons whomsoever.

Orders with respect to bridges in the county of York to be made at the Sessions after Easter.—By Section 6, All orders and proceedings within the county of York, relative to county bridges, shall in future be made and had by the justices of the respective ridings, assembled at the Annual and General Quarter Sessions holden the first whole week after Easter, and at no other Sessions whatever, within such ridings, except at such adjournment as shall be made at the above Annual and General Quarter Sessions, so holden as aforesaid, for the express purpose of carrying such orders into effect:—Provided, that it shall be lawful for any two justices of the said ridings respectively, in cases of emergency, to give such orders for making temporary bridges, or such temporary repairs as shall be necessary for the temporary accommodation of the public.

In the case of *Rex v. The Justices of Dorset and*

others (a), it appeared that the justices of Dorset having, under the above Statute, contracted for the building of a new bridge in a different site than the old one, which was ruinous, had directed that the old bridge should be taken down before the new one was passable, for the benefit of the materials to be used by the contractor in finishing the new bridge. The Court of K. B. refused a *writ of prohibition* to them to restrain them from pulling down the old bridge before the new one was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood, in being obliged to use a round-about-way in the interval; and left the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; as there appeared no occasion to interfere by the application of a prompt remedy, of a novel kind in modern practice. *Per* Lord Ellenborough, C. J. "If there were in use a clear known *festinum remedium*, we might aid you; but when the application of a writ of prohibition to such a case as this would confessedly be new in modern practice, and there is a clear known remedy by indictment in the ordinary course, if the parties against whom you move be pulling down the old bridge illegally, we do not feel ourselves called upon to apply any new remedy. What must have been the case, if the magistrates had ordered the bridge to be rebuilt on the old site, when it would have been impossible to continue the old bridge standing, until the new one was finished?"

Materials for bridges to pass, toll-free, on turnpike roads.—By Stat. 13 Geo. 3. c. 84. s. 60, It is provided,

(a) 15 East, 594. See *Rex v. Severn and Wye Railway Company*, 2 B. & A. 646, where a

mandamus was granted to enforce the re-instating a rail-road, that had been illegally taken up.

That no toll shall be paid for carriage along a turnpike road of materials for the repair of any turnpike road or public highway. Upon this clause it was held, in the case of *Osmond v. Widdicombe* (a), that a bridge was not included in the term, "public highway." This decision, however, seems to have been as little consonant with the intention of the Legislature, as it is agreeable to principle. And, accordingly by *Stat. 3 Geo. 4. c. 126. s. 82*, materials for the repairs of bridges are expressly exempted from the payment of toll.

Regulations enabling counties to contract for the repair of public bridges, or the highways at the ends thereof.— By *Statute 12 Geo. 2. c. 29. s. 14*, When any public bridges, ramparts, banks, or cops, or other works, are to be repaired at the expence of the county, city, riding, &c. the justices at their General or Quarter Sessions, after presentment made by the grand jury of want of reparation thereof, may contract with any person for rebuilding, repairing, and amending the same, for any term not exceeding seven years, at a certain annual sum. In order to which they shall, at their General Quarter Sessions, give public notice of their intention of contracting with any person for rebuilding, repairing, and amending the same. And such contracts shall be made at the most reasonable price which shall be proposed by the contractors; who shall give sufficient security for the due performance thereof to the clerk of the peace, or the town clerk, or chief officer of such county, &c. And all contracts, when agreed to, and all orders relating thereto, shall be entered in a book to be kept by the clerk of the peace, &c. for that purpose; who shall keep the same amongst the re-

(a) 2 B. & A. 49.

cords of the county, &c. to be inspected by any of the justices within their limits at all seasonable times, and by any person employed by any parish or place, contributing to the same, without fee.

By *Stat. 52 Geo. 3. c. 110. s. 1*, reciting, that by *Stat. 12 Geo. 2. c. 29*, No part of the money to be raised and collected in pursuance of that Act, shall be applied to the repair of any bridges, gaols, prisons, or houses of correction, until presentments be made, by the respective grand juries at the assize, great sessions, general gaol delivery, or general or quarter sessions of the peace, held for any county, riding, division, city, town corporate, or liberty, of the insufficiency, inconveniency, or want of reparation of their bridges, gaols, prisons, or houses of correction; and that when any public bridges, ramparts, banks, or cops, or other works are to be repaired at the expence of any county, city, &c. it shall be lawful for the justices of the peace, at their general or quarter sessions respectively, or the greater part of them then and there assembled, if they think proper and convenient, after presentment to be made as aforesaid of the want of reparation of such bridges, ramparts, banks, or cops, to contract and agree with any person or persons for rebuilding, repairing, and amending of such bridges, ramparts, banks, or cops as shall be within their respective counties, &c. and all other works which are to be repaired and done by assessment on the respective counties, &c. for any term or terms of years, not exceeding seven years, at a certain annual sum, payment, or allowance for the same, such contractor giving sufficient security for the due performance thereof to the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate, or

liberty; and that such justices, at their respective general or quarter sessions, shall give public notice of their intention of contracting for rebuilding, repairing, and amending the bridges, ramparts, banks, or cops, and other works aforesaid, and that such contracts shall be made at the most reasonable price which shall be proposed by such contractors respectively; and that all contracts, when agreed to, and all others relating thereto, shall be entered in a book to be kept by the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate, or liberty, for that purpose, who is and are hereby required to keep them amongst the records of such county, &c. to be from time to time inspected at all seasonable times by any of the said justices within the limits of their commissions, and by any person or persons employed or to be employed by any parish, township, or place, contributing to the purposes of the Act, without fee or reward: and reciting, that great expence in the repairs of county bridges, ramparts, banks, cops, or other works appertaining to the same, and of the roads over the same, and of so much of the roads at the ends thereof as by law is to be repaired at the expence of any county, riding, &c. and great inconvenience to the public may be often in a great measure prevented by timely and immediate repair of any inconsiderable damage, injury, defect, or sudden want of repair or amendment of the same, without the delay which must generally arise from the necessity, imposed by the aforesaid Act, of a presentment by the grand jury at the assize, great sessions, or general or quarter sessions of the peace held for any county, city, &c. of the want of reparation of the same, by means of which delay the aforesaid want of repair is often very much increased, to the great expence of the

county, and great inconvenience of the public: and reciting, that it is also expedient that the justices of the peace of any county, city, &c. at their general quarter sessions respectively, before any presentment shall have been made as aforesaid, as directed by the aforesaid Act, of the want of repair of such roads, should be enabled, without any such presentment, to contract and agree with certain persons hereinafter mentioned, for the repairing and amending of the same, and also for keeping the same in repair when so repaired and amended:—It is enacted, that it shall be lawful for the justices of the peace of any county, city, &c. at their general quarter sessions or great sessions respectively, to be holden in the week next after the clause of Easter, or the greater part of them then and there assembled, to appoint annually two or more justices acting in and for any division of justices in such county, city, &c. in or near which any such county bridge, or any bridge which is in part a county bridge, ramparts, banks, cops, or other works appertaining to the same, or any part or parts thereof, or the roads over the same, or so much of the roads at the ends thereof as by law is to be repaired at the expence of any county, city, &c. shall be situate, to superintend the same; and whenever it shall appear on their own inspection, to be necessary for the purpose of preventing the further decay and injury of the same, to order any immediate repairs or amendments to be done to the same or to any part thereof; but it shall be lawful for any two justices so to be appointed as aforesaid, by a written order (a), signed by their hands respectively, to order such immediate repairs to be done by such person as to them shall seem fit:—Provided that in no case the sum

(a) See Form, Appendix, No. LXXXIX.

to be expended by them in such repairs shall exceed the sum of £20:—And further that such appointments of such justices as aforesaid shall remain in force until one week after the following Easter Sessions respectively ; And that in case of the death of, or removal of, or refusal to act by any such justice so appointed as aforesaid, the said court of general quarter sessions or great sessions may at any other of the four quarterly sessions, appoint any other justice to act for the remainder of the then current year, in the place of any such justice so dying, removing, or refusing to act as aforesaid.

By *Section 2*, The justices of the peace of any county, city, &c. at the general quarter sessions or great sessions, which shall next happen after such repairs so ordered to be made by such justices so appointed as aforesaid shall be completed, or the greater part of them then and there assembled, may order the payment of such sum or sums of money, not exceeding £10, as shall be sufficient to pay for such repairs, to be made out of the county rate, to such persons who shall have so repaired the same by such order of such justices as aforesaid, although no presentment shall have been made by any grand jury at the assize, great sessions, or general quarter sessions of the peace of any county, city, &c. in which such repairs shall have been done, of the want of such reparation as by the said *Stat. 12 Geo. 2*, was directed:—Provided nevertheless, that before such payment be ordered to be made as aforesaid, a certificate (a) be returned to such justices so assembled at such last-mentioned sessions, signed by two at the least of such justices so appointed as aforesaid, who shall have so ordered such repairs as

(a) See Form, Appendix, No. XC.

aforesaid, stating the nature of such repairs, and the defects, damage, or injuries which they had so ordered to be repaired, and their reason for so ordering such immediate repairs as aforesaid :—Provided also, that such justices so assembled as last aforesaid be satisfied by the parties concerned, that the charges made by them for such repairs are reasonable and just.

By *Section 5*, After July 1st, 1812, it shall be lawful for the justices of the peace of any county, city, &c. at their General Quarter Sessions respectively, or the greater part of them then and there assembled, if they shall think proper and convenient, to contract and agree with the commissioners or trustees of any turnpike road within the said county, &c. or with their surveyor or clerk, or with both their surveyor and clerk, or with the surveyor or surveyors of the highway of any parish, place, or tything within the said county, &c. respectively, or with any other persons, for the maintaining and keeping in repair roads over any county bridges, and of so much of the roads at the ending thereof as by law is to be repaired at the expence of any such county, &c. or any part of the same, for any term, not exceeding seven years nor less than one, although no presentment shall have been made, as directed by the said *Stat. 12 Geo. 2*, of the insufficiency, inconveniency, decay, or want of repair of the same; subject, however, to all the rules, &c. required by the said *Stat. 12 Geo. 2*, in case where the same shall have been presented or directed by that Act.

And by *Stat. 55 Geo. 3. c. 143. s. 5*, Reciting, that it is expedient that the powers contained in *Stat. 43 Geo. 3. c. 59*, for authorizing the justices of the peace of any county, city, riding, division, town corporate, or liberty,

at their General Quarter Sessions of the peace, to contract for maintaining and keeping in repair roads over county bridges, and so much of the roads at the ending thereof as by law is to be repaired at the expence of counties, although no presentment shall have been made of the want of repair, as directed by an Act passed in the twelfth year of his late Majesty King George the Second, intituled, "An Act for the more easy assessing, collecting, and levying of county rates," (12 Geo. 2. c. 29,) should be extended to the bridges as well as to the roads at the end thereof;—It is enacted, that it shall be lawful for the justices of the peace of any county, city, riding, division, town corporate, or liberty, at their General Quarter Sessions respectively, to contract and agree, or to authorize any other person or persons to contract and agree with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the road at the ends thereof as are by law liable to be repaired at the expence of any such county, hundred, city, riding, division, town corporate, or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for and agreed to be paid for the repairing, amending, and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof) by the treasurer of the county out of the county rate, or (in cases where the hundred is liable to the repair of the same) by the bridge master (or other public officer charged with the repair of bridges) of the hundred by which such bridge is liable to be repaired, for any term, not exceeding seven years nor less than one, although no presentment of the insufficiency, decay, or want of repair of the same shall have been

made, and although no public notice shall have been given by the said justices, at their respective General or Quarter Session, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said Act of the twelfth year of his late Majesty King George the Second:—Provided nevertheless, that before any such contract shall be made, the said justices shall cause notices to be given in some public newspaper circulated in such county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract.

II. *The liability to repair public Bridges by Tenure or Prescription.*

The *onus* of repairing any public bridge, which *prima facie* attaches upon the county, may be transferred to bodies politic, smaller districts, or individuals, by reason of prescription or the tenure of land, upon precisely the same principles as apply in this respect to highways in general. It is needless, therefore, to do more, in this place, than to refer to what has already been said upon that subject (a).

One provision of the Legislature, however, for the better amendment of bridges, which are repairable by prescription, by empowering the county to compound for undertaking the repair thereof, must here be mentioned.

By *Stat. 3 Geo. 4. c. 126. s. 107*, After reciting, that many bridges on turnpike roads are by prescription liable

(a) See ante, page 93.

to be repaired by certain parishes, and not by the county or counties in which they are situated, and which bridges from change of times and circumstances are become no longer sufficiently convenient for the use of the public without being enlarged or otherwise improved ; It is therefore enacted, That it shall be lawful for any such county or counties, parish or parishes respectively, to enter into a composition or agreement with each other, and by the authority of those persons who shall be legally competent to make rates for such county and parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken and lie upon the county or counties in which such bridge is locally situated ; and all rates made for carrying into effect any such composition, agreement, repairs, or improvement, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes in the law whatsoever.

And by *Section 108*, The trustees of any turnpike road and such parish or parishes may in like manner enter into a composition or agreement with each other, and by the authority of the persons at present legally competent to make rates for such parish or parishes, whereby in consideration of such sum or sums of money as shall be agreed upon being yearly paid to the treasurer of the trustees entering into such composition or agreement, out of the rates to be raised for the repair of the bridge or bridges the subject thereof, the repairs of any such bridge shall, during the continuance of any Act or Acts of Parliament under which such trustees shall be appointed or act, be undertaken and carried on by the said trustees ; and all rates and assessments raised and levied for carrying such composition or agreement into effect,

shall, in like manner, be good and valid to all intents and purposes whatsoever.

III. The reparation by the County of 300 Feet at the ends of the Bridges.

By *Stat. 22 Hen. 8. c. 5. s. 9*, Such part and portion of the highways, as well within franchises as without, as lie next adjoining to any ends of any bridges, distant from any of the said ends by the space of 300 feet, shall be made, repaired, and amended as often as need shall require; and the justices, or four of them (one whereof is of the *quorum*) shall have power to inquire, hear, and determine, in the General Sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges, distant from any one of the ends of such bridges 300 feet, and to do in every thing concerning the making, repairing, and amending of such highways, in as ample manner as they may do for the making, repairing, and amending of bridges.

In *Rex v. The Inhabitants of the West Riding of Yorkshire* (a), an indictment for not repairing a highway alleged that a certain part of the highway at the township of Quick, &c. to wit, a certain part thereof lying next adjoining the west end of a certain public bridge there, called Tamewater Bridge, and within the distance of 300 feet thereof, was and yet is very ruinous, &c. And that the inhabitants of the West Riding, &c. of right ought to repair, &c. Plea, Not Guilty. The evidence (as far as it is material to this point) was, that the township of

(a) 7 East, 588.—3 Smith's Rep. 467, S. C.

Quick lay in the parish of Saddleworth, in the said riding, which parish had been immemorially divided into four districts, called Mears, in one of which mears called Shaw Mear, the highway in Quick hereinbefore mentioned lay; and that the 300 feet, at the other end of the bridge, lay in another mear; and that each mear had respectively repaired the said respective highways, &c. The main argument was upon the liability of the county to repair these ends of 300 feet each, in the same manner as they were liable to repair the bridge. This was decided in the affirmative. But *arguendo*, it was said by Mr. Holroyd, who was counsel for the Crown, and not contradicted by the Court, that no question could arise as to any special liability of the respective mears, because the general issue only was pleaded; and any question of that sort, he said, could only be raised by a special plea. He cited *Rex v. The City of Norwich (a)*. The counsel for the defendants argued against this, upon the principle of assuming that these *ends* were *highways*, and not parts of the bridge. This, however, the Court over-ruled.

This case was affirmed upon appeal to the House of Lords (*b*). The plaintiff, in Error, contended, that the *Stat. 22 Hen. 8. c. 5*, did not impose the liability to repair the 300 feet at the ends of bridges upon the riding (or, county). It looked only to such bridges as were then in existence, and where, probably, by immemorial usage, the persons who were bound to repair the bridge, had also immemorially repaired the highway at each end of the bridge; but to what extent was not certainly known, and therefore that Act limited the extent to 300 feet at each end of such bridge. *Sed per* Lord Eldon, Chancellor:

(a) 1 Stra. 180, 182.

(b) 5 Tanut. 284.

" My opinion has not been formed merely on what I have heard this day, but on previous consideration, that the county is by law bound *primâ facie* to repair the roads at the ends of every bridge, which bridge it is bound to repair; the Statute has fixed the length at 300 feet."

Where the inhabitants of the county of *Devon* erected a new and substantive bridge of public utility, and which was adopted by the public, *within the 300 feet* next adjoining to an old bridge situate in the county of *Dorset*, and which 300 feet of highway the county of *Dorset* was liable to repair; it was decided that the new bridge was, nevertheless, repairable by the county of *Devon*. Each was built to be a substantive bridge in a different county, and the new bridge was not to be considered as an appendage to the other (a).

IV. *As to the Indictment, &c. for the non-repair of public Bridges (b).*

Under this head will be noticed a few regulations, which apply, peculiarly, to the repair of public bridges. In general, the principles which govern the prosecution of nuisances, &c. on public bridges, are similar (substituting the county for the parish) to those which relate to highways, in general; especially where the liability to repair arises from prescription, or the tenure of land. For an explanation of these principles, therefore, the reader is referred to the last Chapter of this Treatise.

(a) *Rex v. The Inhabitants of the County of Devon*, 14 East, 477.

(b) See the Form of an Indictment, Appendix, No. XCI.

At the common law, the presentment of a public bridge might be before the King's Bench, or at the assizes. So also the decays of bridges are presentable in the leet or tourn (*a*).

By *Stat. 22 Hen. 8. c. 5. s. 1*, The justices of peace in every shire of this realm, franchise, city, or borough, or four of them at least (one whereof is of the *quorum*), shall have power to inquire, hear, and determine in the General Sessions, all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment against such as ought to be charged to make or amend them, as the King's Bench usually doth, or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges.

Four of them at the least.—If the bridge be within a franchise which hath not four justices and a sessions of its own, the justices of the county shall inquire; but if the franchise be a county of itself, and hath not four justices (one whereof is of the *quorum*), it is not within this Statute, but is left to the remedy which it had at common law (*b*).

By *Section 5*, Where the bridge is in one shire, and the persons or lands, which ought to be charged, in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged, are out of the said city; the justices of such shire, city or town corporate, shall have power to hear

(*a*) 2 Inst. 701.

(*b*) 2 Inst. 702.

and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm, against such as ought to repair the same, and to do further in every behalf as they might do, if the persons or lands chargeable were in the same shire, city or town corporate where the annoyance is.

By *Stat.* 12 Geo. 2. c. 29. s. 13, No money shall be applied to the repair of bridges, until presentment be made by the grand jury at the assizes or sessions, of their insufficiency, inconveniency, or want of reparation.

But we have seen (*a*), that by *Stat.* 55 Geo. 3. c. 143. s. 5, county bridges, repaired under *contract*, may be repaired without presentment.

As to who may be jurors. — It seemeth that no inhabitant of a county ought to be a juror for the trial of an issue, whether the county be bound to such repairs or not; and therefore the jury must come from some adjacent county (*b*).

What justices may try the indictment. — And it seemeth that the same objection may lie as to the justices, where they are (as it may probably happen) all interested. In which case it seemeth, that the trial shall be in the next county (*b*). For where an impartial trial cannot be had in the proper county, it shall be tried as near to the same as may be. As in the case of *Rex v. The In-*

(*a*) Ante, p. 360.

(*b*) 1 Hawk. P. C. c. 77. s. 6.

habitants of the County of the City of Norwich (a), concerning a county bridge, the trial was in Suffolk.

Witness.—By *Stat. 1 Ann. st. 1. c. 18*, An inhabitant of the county may be a witness upon the indictment of a public bridge.

Fine, &c.—And by *Section 4*, of that Act, No fine, issue, penalty, or forfeiture, upon any presentment or indictment for not repairing bridges, or the highways at the end of bridges, shall be returned into the Exchequer, but shall be paid to the treasurer, to be applied towards the said repairs, and not otherwise.

Certiorari.—By *Section 5*, No presentment or indictment for not repairing bridges or highways at the ends of bridges, shall be removed by *certiorari* out of the county into any other court.

It was decided by the Court of K. B. in the case of *Rex v. The Inhabitants of the County of Cumberland (b)*, and which decision was confirmed, upon appeal, by the House of Lords (c), that the above clause has not taken away from the Crown the power of removing by *certiorari* an indictment for not repairing a county bridge.

And where the right to repair is in dispute, the *defendant* is at liberty to remove the indictment by *certiorari*.

Thus, upon motion to quash a *certiorari* to remove an indictment against the defendants at Sessions, for not re-

(a) 1 Stra. 177, cited in *Rex v. Cowle*, 2 Burr. 859, 860. So in *Rex v. The Inhabitants of the County of Devon*, the trial was in

the County of Somerset, 14 East, 477.

(b) 6 T. R. 194.

(c) 3 B. & P. 354.

pairing a bridge, it was insisted, that by *Stat. 1 Ann. c. 18*, the *certiorari* is taken away. To which it was answered and resolved by the Court, that this Act extended only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the Act 5 & 6 W. & M. c. 11, had allowed the granting a *certiorari*. And therefore they refused to quash (*a*).

But in such a case the *certiorari* must be moved for before judgment has been pronounced in the inferior Court. Therefore where, upon an indictment at the Quarter Sessions, for not repairing a bridge, a verdict was found for the Crown, and judgment pronounced accordingly, the Court of K. B. would not allow a *certiorari* to issue, to remove the indictment for the purpose of taking objections to it. *Per Cur.* The defendants have thought proper to take the chance of succeeding at the Sessions. They ought clearly to have applied for a *certiorari* before the trial, and it ought not to issue in this late stage of the proceedings. They can now avail themselves of objections to the indictment by writ of error only (*b*).

A *certiorari* lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private Act of Parliament; and the justices ought to return the private Act upon which their order is founded (*c*).

(*a*) *Rex v. The Inhabitants of Hamworth*, 2 Str. 900.

negoes and Town of Machynlleth, 1 B. & C. 142.

(*b*) *Rex v. Inhabitants of Pen-*

(*c*) *Dalt.* 504.

CHAPTER V.

AS TO THE DIVERSION AND EXTINCTION
OF HIGHWAYS.

WE now arrive at a most important and practical branch of the law relating to Highways—that which regulates the diverting of the way into another course, more convenient to the public; or, in case the way be found to be altogether unnecessary, the absolute extinguishment of it.

At the common law, indeed, there can be no destruction of the public right. Under this system, a highway must always continue to be a highway. The case of *Fowler v. Sanders* (a), fully proves, that it cannot be narrowed: neither can it be inclosed. The people have no ability to consent to a relinquishment of any of their rights, except by the agency of their representatives in Parliament. But although by the common law, a public way cannot be destroyed, yet it may be changed from its old course into some other, provided it be equally advantageous to the passengers.

The Legislature, however, has supplied the deficiency of the common law in this respect, by enactments, which permit the extinction of highways, under such restrictions as are deemed sufficient to prevent too great an infringement upon the public rights.

(a) Cro. Jac. 446.

The subject of this Chapter will be considered under the two following heads:—1st, As to the diversion of highways at the common law; and 2d, As to the diversion and extinction of highways under Acts of Parliament.

SECTION I.

As to the diversion of highways at the common law.

It is decided, that an ancient highway cannot be changed, without the king's licence first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found, that such a change will not be prejudicial to the public (*a*); and it was said, that were the owner of the soil to change a highway without such authority, he might resume and stop up the new way at his option. And it seemeth that the king's subjects have not such an interest in such new way as will make good a general justification of their going in it as a common highway; but that in an action of trespass, brought by the owner of the land against those who shall go over it, they ought to shew especially, by way of excuse, how the old way was obstructed, and the new one set out (*b*). And it was considered, that the inhabitants would not be bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it (*c*).

In the case of *Payne v. Partridge* (*d*), the defendant, who was the owner of a ferry, had built a bridge in the

(*a*) Cro. Car. 266, 267.

(*c*) See 1 Hawk. P. C. c. 76.

(*b*) Cro. Car. 267. Yelv. 141,

s. 3.

144.

(*d*) 1 Salk. 12, pl. 1.

stead of it, without first suing out a writ of *ad quod damnum*. And the Court held, that he could not let down the ferry and put up a bridge without licence and an *ad quod damnum*.

So in *Hind v. Mansfield* (a), the defendant was fined £200 for diverting part of the River Thames, by which he weakened the current of the river, to carry barges, &c. towards London, and other houses of the King upon that river; and such a thing cannot be done without an *ad quod damnum*, because that river is an highway.

In *Ex parte Armitage and others* (b), Lord Hardwicke says, "In all cases of writ of *ad quod damnum*, whether to change an old way for a new one, or to alter the condition of a way, the new way, or way so altered, must be, to all intents and purposes, as beneficial to the King and subjects as the old way was before." In that case a writ of *ad quod damnum* had been obtained "to lay down timber, wood, and other materials for a waggon-way," on an already existing way. And, for the want of an equivalent to the public, the writ was quashed upon motion before the Lord Chancellor.

But the finding under a writ of *ad quod damnum* favorable to those at whose instance it has issued, is traversable; it is not conclusive in their favor; *it is not a bar to an indictment for a nuisance*. The jury by

(a) Noy, 103; and see the Case of the Isle of Ely, 10 Rep. 141, where it seems to be held, that the Commissioners of Sewers have power to divert the course

of a public river; and see *per* Littledale, J. in *Rex v. Mountague*, 4 B. & C. 605.

(b) Ambli. 294.

whom such an indictment is to be tried, have a right to exercise their own judgment upon the matter, and may find that to be a public nuisance, which, under this writ, may have been found not to be to the prejudice of his Majesty's subjects (a).

This process by writ of *ad quod damnum* is, at the present day, almost disused; and has given place to the form of proceeding ordered by the *Statutes* 13 Geo. 3. c. 78, and 55 Geo. 3. c. 68, which will afterwards be detailed. I shall only mention, with regard to the old proceeding, that the writ of *ad quod damnum* is an original writ, issuing out of and returnable into Chancery, directing the sheriff to inquire by a jury, whether such change will be detrimental to the public: which inquisition, being a proceeding only *ex parte*, is, as has been already observed, in its own nature traversable; and heretofore the party grieved might be heard against it before the Chancellor. But now by the 3d section of *Stat.* 55 Geo. 3. c. 68, Any person or persons injured or aggrieved by the inclosure of any road or highway by virtue of any inquisition, taken upon any writ of *ad quod damnum*, may make his or their complaint thereof by appeal to the justices of the peace at the said Quarter Sessions (b), upon giving ten days' notice in writing of such appeal to the surveyor of the highways of the parish, township, or place, wherein such highway, bridleway, or footway shall be situated; and also affixing such notice to the door of the church or chapel of such parish,

(a) See 6 B. & C. 600, per Ld. Tenterden, C. J. in the case of *Rex v. Russell*.

shall be holden within the limit where the highway, so inclosed, shall lie.

(b) The Quarter Sessions which

township, or place; and the said Court of Quarter Sessions is thereby authorized and empowered to hear and finally determine such appeal.

In the case of *Rex v. The Justices of Essex* (a), it was decided, that upon an appeal against the inclosure of a highway by virtue of a writ of *ad quod damnum*, it is incumbent upon the party to give the notices required by this 3d section; and that a notice to the party interested is not alone sufficient. Lord Ellenborough, C. J. said "I cannot engender or innocate my mind with any doubt on this subject. The 3d clause of 55 Geo. 3. c. 68, specifically combines together the two cases of roads stopped up by order of magistrates, and by virtue of a writ of *ad quod damnum*, and requires in both cases the same notices to be given."

The said Sessions.—In the above case, Lord Ellenborough, C. J. said, "The '*said Quarter Sessions*,' refer to the Quarter Sessions, meeting at a particular place, and having jurisdiction within the limits where the highway stopped up may happen to lie;" and *per* Bayley, J. "The words '*said Sessions*' only refer to the Sessions for the county in which the road stopped up is situate."

It should seem, that the notices required by the 2d section of the above Act, cannot apply to the proceeding by writ of *ad quod damnum*, and therefore that the limitation of time within which any appeal may be lodged against an inquisition under that proceeding, remains unaltered. Therefore, the appeal must be made at the Sessions next after the inquisition taken and entered and

(a) 1 B. & A. 373.

recorded (a). And where an appeal was delayed until the next Sessions after the *inclosure* made by virtue of an inquisition upon writ of *ad quod damnum*, it was considered to be too late (b).

After the change of the road is accomplished, under this proceeding, and the new road is made and put into proper order, the parishioners are liable to its repair, as they previously were with regard to the old way. But if the new road lie in another parish from that in which the other was situate, then the person who sued out the writ must keep it in repair (c).

A highway may be changed by the act of God. Therefore, it hath been holden, that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old (d). In *Com. Dig. Chimin.* (A. 1.) it is said, "A navigable river is in the nature of a highway, and if the water alters its course, the way alters; *per* Thorp, 22 Ass. 93." This case cited by Comyn is mentioned by Holroyd, J. in the case of *Rex v. Mountague* (e), where it is thus stated—"et nota, Thorpe, J. saith, if a water be a high street, which water by its own force changes its course upon another soil, yet it shall have there the same high street as it had before in its ancient course, so that the lord of the soil

(a) Provided there be sufficient time to give the requisite notices—if not, then at the succeeding Sessions. See 13 Geo. 3. c. 78. s. 19.

(b) *Rex v. The Justices of*

Bucks, 2 M. & S. 230.

(c) See 3 Atk. 766.

(d) See Cro. Car. 267.—1 Roll. Abr. 390; and Hawk. P. C. c. 76. s. 4.

(e) 4 B. & C. 604.

cannot disturb the new course,"—which is not merely the *dictum* of Thorp, J. but he states it to have been so held in the case of *Nottingham*.

In the above mentioned case of *Rex v. Mountague*, it was held that a public right of navigation in a river or creek may be extinguished by natural causes, such as the recess of the sea, or an accumulation of mud, &c. In allusion to the case then before the Court, Bayley, J. said, "Most probably the rights of the public, if they ever had any, arose from the flux and reflux of the tides of the sea, so as to make the channel navigable. If then the sea retreated, or the channel silted up, so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes also put an end to them?"

SECTION II.

As to the diversion and extinction of highways under Acts of Parliament.

Besides the methods already stated, ways are sometimes changed or stopped up, and new ones created by Turnpike Acts, Inclosure Acts, or other Acts of Parliament, containing specific enactments for such purposes. But such ways may or may not be public, according to the provisions of the particular Acts. And it has been decided, that where a road was set out by commissioners under an Inclosure Act as a private road, for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, the number of persons using or repairing it would not make it a public way, if it were not common to all the king's

subjects. The question, it was said, was not varied by the fact that many individuals were liable to repair, or that many others were entitled to the benefit of it; nor did the circumstance of this road having been set out under a public Act of Parliament, make the non-repair of it an indictable offence (a).

And if a way, which has formerly been open and uninclosed, be inclosed under the provisions of an Act of Parliament by the persons to whom the adjoining allotments are awarded, it shall be repaired by the parish, notwithstanding the inclosure thereof (b).

If any form of proceeding is prescribed by an Act of Parliament, for the purpose of altering the course of highways, its requisitions should be strictly complied with. And, although the Courts will presume that the giving of notices or other preliminary matter has been correctly executed, if the *usage* has been pursuant to the order under the Act, yet if that is not the case, the order itself shall not be received in evidence, in any collateral proceeding, until proof is given of a compliance with the terms of the enactment (c).

For the purpose of rendering the diversion of highways more expeditious and less expensive, and for remedying therein the defects of the common law, the

(a) *Rex v. Richards*, 8 T. R. 634.

(b) *Rex v. The Inhabitants of Flecknow*, 1 Burr. 461. See ante, page 90, as to the nature of the liability to repair on account of inclosure.

(c) *Rex v. The Inhabitants of Haslingfield*, 2 M. & S. 558. See *Rex v. Tippet*, 3 B. & A. 193, where it was contended, that the operation of an Act of Parliament was indirectly to extinguish a highway, but without success.

Legislature has made several enactments, to authorize the change, and even the discontinuance of highways, subject to certain restrictions and regulations therein contained.

I shall now proceed to state these enactments, and the several decisions respecting them, which have occurred. And this will be done under two heads: 1st, As relating to highways in general; and 2dly, As relating to turn-pike roads.

FIRST: *The enactments relating to the diversion, &c. of Highways.*

*Power to widen and divert highways (a).—*By Statute 13 Geo. 3. c. 78. s. 16, It is enacted, That where it shall appear, upon the view of any two or more of the said justices of the peace, that the ground or soil of any highway between the fences thereof is not of sufficient breadth, and may be conveniently widened and enlarged; or that the same cannot be conveniently enlarged, and made commodious for travellers without diverting and turning the same; such justices shall, and they are hereby empowered, within their respective jurisdictions, to order (b) such highways respectively (c) to be widened and enlarged, or diverted and turned, in such manner as they shall think

(a) This power is further regulated by Stat. 55 Geo. 3. c. 68. see post, p. 384.

(b) See Form, Appendix, No. XLII.

(c) It has been decided, that the power thus given to two justices, to order any highway to be

widened, extends to roads repairable *ratione tenuræ*; and that upon disobedience to such order, the party may either be proceeded against summarily under the Statute, or by indictment, as for an offence at the common law. *Rex v. Balme, Cowp. 648.*

fit; so that the said highways, when enlarged and diverted, shall not exceed thirty feet in breadth; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, park, paddock, court, or yard:—And for the satisfaction of the person or persons, bodies politic or corporate, who are seised or possessed of or interested in their own right, or in trust for any other person or persons, in the said ground that shall be laid into the said highways respectively so to be enlarged, or through which such highway, so to be diverted and turned, shall go, the said surveyor, under the direction and with the approbation of the said justices, shall and is hereby empowered to make an agreement with him, her, or them, for the recompence to be made for such ground, and for the making such new ditches and fences as shall be necessary, according and in proportion to their several and respective interests therein; and also with any other person or persons, bodies politic or corporate, that may be injured by the enlarging, altering, or diverting such highways respectively, for the satisfaction to be made to him, her, or them respectively as aforesaid:—And if the said surveyor, under the direction and with the approbation of the said justices, cannot agree with the said person or persons, bodies politic or corporate; or if he, she, or they cannot be found, or shall refuse to treat, or take such recompence or satisfaction as shall be offered to them respectively by such surveyor; then the justices of the peace, at any General Quarter Sessions, to be holden for the limit wherein such ground shall lie, upon certificate in writing (*a*), signed by the justices making such view as aforesaid, of their proceedings in the premises, and upon proof of four-

(*a*) See Form, Appendix, No. XLIII.

teen days' notice in writing having been given by the surveyor of such parish, township, or place, to the owner, occupier, or other person or persons, bodies politic or corporate, interested in such ground, or to his, her, or their guardian, trustee, clerk, or agent, signifying an intention to apply to such Quarter Sessions for the purpose of taking such ground, shall impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such Quarter Sessions; and the said jury shall upon their oaths, to the best of their judgments, assess the damages to be given and recompence to be made to the owners and others interested as aforesaid in the said ground, for their respective interests, as they shall think reasonable, not exceeding forty years' purchase for the clear yearly value of the ground so laid out; and likewise such recompence as they shall think reasonable, for the making of new ditches and fences on the side or sides of the said highways that shall be so enlarged or diverted; and also satisfaction to any person or persons, bodies politic or corporate, that may be otherwise injured by the enlarging or diverting the said highways respectively.

And by *Section 18*, If the jury shall give a verdict for more monies than what shall have been offered by the surveyor, before such application to the said Court of Quarter Sessions, the costs and expences attending the several proceedings shall be paid by the surveyor out of the money in his hands, or to be assessed and levied under this Act; but if the jury shall give a verdict for no more or for less monies than shall have been so offered by the surveyor, then the costs and expences shall be paid by the person, or body politic or corporate, who refused to accept the recompence and satisfaction so offered to him, her, or them, as aforesaid.

By the 16th *Section* it is further enacted, That upon payment or tender of the money so to be awarded and assessed to the person or persons, bodies politic or corporate entitled to receive the same, or leaving it in the hands of the clerk of the peace of such limit, in case such person or persons, bodies politic or corporate cannot be found, or shall refuse to accept the same, for the use of the owner of, or others interested in the said ground, the interest of the said person or persons, bodies politic or corporate in the said ground shall be forever divested out of them; and the said ground, after such agreement or verdict as aforesaid, shall be esteemed and taken to be a public highway to all intents and purposes whatsoever; saving nevertheless to the owner or owners of such ground all mines, minerals, and fossils lying under the same, which can or may be got without breaking the surface of the said highway; and also all timber and wood growing upon such ground, to be fallen and taken by such owner or owners within one month after such order shall have been made; or in default thereof, to be fallen by the said surveyor or surveyors within the respective months aforesaid (a), and laid upon the land adjoining for the benefit of the said owner or owners.—And by the same *Section* it is further provided, That where there shall not appear sufficient money in the hands of the surveyor or surveyors, for the purposes aforesaid, then the said two justices, in case of agreement, or the said Court of Quarter Sessions, after such verdict as aforesaid, shall order an equal assessment to be made, levied, and collected upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, in the respective parishes, townships, or places, where such highways shall lie, and direct the money to be paid to the

(a) By sect. 13. See ante, p. 175.

person or persons, bodies politic or corporate, so interested, in such manner as the said justices or Court of Quarter Sessions respectively shall direct and appoint; and the money thereby raised shall be employed and accounted for according to the order and direction of the said justices or Court of Quarter Sessions respectively, for and towards the purchasing the land to enlarge or divert the said highways, and for the making the said ditches and fences, and also satisfaction for the damage sustained thereby; and the said assessment, if not paid within ten days after demand, shall, by order of the said justices or Court of Quarter Sessions respectively, be levied by the said surveyor in the manner hereinafter mentioned (a):—Provided, That no such assessment to be made in any one year shall exceed the rate of sixpence in the pound of the yearly value of the lands, tenements, woods, tithes, and hereditaments so assessed.

Power to stop up unnecessary highways. Notices to be given, previous to the diversion or extinction of a highway.—The 19th Section enacts, That highways, bridleways, and footways, may be diverted by the justices at their Special Sessions, with the consent of the owner of the lands, so as to make them nearer and more commodious to the public; and provides for an appeal to the Quarter Sessions by the persons injured by any such proceedings. But this part of the Section is repealed by the Stat. 55 Geo. 3. c. 68. s. 1, which recites, that it is expedient, that more public notice should be given of any order made, or proceeding had for diverting, turning, stopping, and inclosing any highway, bridleway, or foot-

(a) See ante, p. 168, as to the mode of enforcing the payment of assessments.

way; and also that a greater facility of appeal to the Quarter Sessions, against such order or proceeding, should be given to any person or persons who may think themselves aggrieved thereby; and also that the justices of peace should have power, under certain regulations, to stop up unnecessary highways, bridleways, and footways.

It is therefore enacted by the 2d *Section* of this Act, That, when it shall appear, upon the view of any two or more of the said justices of the peace, that any public highway, or public bridleway or footway, may be diverted, so as to make the same nearer or more commodious to the public, and the owner or owners of the lands and grounds through which such *new* highway, bridleway, or footway, so proposed to be made, shall consent thereto by writing (*a*) under his or their hand and seal or hands and seals, it shall be lawful, by order of such justices (*b*), at some Special Sessions, to divert and turn and to stop up such footway, and to divert, turn, stop up, and inclose, sell and dispose of such old highway or bridleway, and to purchase the ground and soil for such new highway, bridleway, or footway, by such ways and means, and subject to such exceptions and conditions in all respects as in the said recited Act (*c*) mentioned with regard to highways to be widened or diverted:—And also when it shall appear, upon the view of any two or more of the said justices of the peace, that any public highway, bridleway, or footway is *unnecessary*, it shall be lawful, by order of such justices, or any two of them, to stop up and to sell and dispose of such unnecessary highway, bridleway, or footway, by such ways and means, and subject to such

(*a*) See Form, Appendix, No. XLVII.

(*b*) See Form, Appendix, No. XLVIII.

(*c*) 13 Geo. 3. c. 78.

exceptions and conditions in all respects, as in the said recited Act is mentioned, in regard to highways to be widened and diverted; *Except* that the money to arise from such sale, where by the said Act it would be applicable to the purchase of the ground and soil of the new highways or bridleways therein mentioned, shall be paid to the surveyor or surveyors, and be applied towards the general repairs of the highways and bridleways of the parish, township, or place within which the said highway, bridleway, or footway so stopped up shall be situate:— Provided, That in the several cases before mentioned, a notice in the form or to the effect of Schedule A. to this Act annexed (a) shall be affixed in legible characters at the place and by the side of the said highway, bridleway, or footway from whence the same is directed to be turned, diverted, or stopped up, and also inserted in one or more newspaper or newspapers published or generally circulated in the county where the parish, township, or place in which the highway, bridleway, or footway so ordered to be diverted and turned or stopped up (as the case may be) shall lie (or, in case no such newspaper shall be so published or circulated in such county, then in any newspaper or newspapers published or circulated in the nearest adjoining county) for three successive weeks after the making of such order; and a like notice shall be affixed to the door of the church or chapel of every parish, township, or place, in which such highway, bridleway, or footway, so ordered to be diverted, turned, or stopped up, or any part thereof, shall lie, on three successive Sundays subsequent to the making of such order:—And the said several notices having been so published, the said order shall, at the Quarter Sessions which shall be holden

(a) See Form, Appendix, No. XLIX.

within the limit where the highway, bridleway, or footway, so diverted and turned, or stopped up, shall lie, next after the expiration of four weeks from the first day on which such notices shall have been published as aforesaid, be returned to the clerk of the peace in open Court, and lodged with him; and the said order shall, at such Quarter Sessions, be confirmed, and by the clerk of the peace enrolled amongst the records of the said Court of Quarter Sessions.

Appeal to the Quarter Sessions.—And the 3d Section provides, That where any such highway, bridleway, or footway shall be so ordered to be stopped up or inclosed, and such new highway, bridleway, or footway set out and appropriated in lieu thereof as aforesaid; or where any unnecessary highway, bridleway, or footway shall be so ordered to be stopped up as aforesaid, it shall be lawful for any person or persons injured or aggrieved by any such order or proceeding, or by the inclosure of any road or highway by virtue of any inquisition taken upon any writ of *ad quod damnum*, to make his or their complaint thereof by appeal to the justices of peace at the said Quarter Sessions, upon giving ten days' notice in writing of such appeal to the surveyor of the highways of the parish, township, or place wherein such highway, bridleway, or footway shall be situated, and also affixing such notice to the door of the church or chapel of such parish, township, or place: and the said Court of Quarter Sessions is hereby authorized and empowered to hear and finally determine such appeal.

If the order is confirmed, the old highway shall be stopped up, and sold.—And by Section 4, It is enacted, That if no such appeal be made, or being made, such

order and proceedings shall be confirmed by the said Court, the said inclosures may be made and the said ways stopped; and the proceedings thereupon shall be binding and conclusive to all persons whomsoever; and the new highways, bridleways, and footways, so to be appropriated and set out, shall be and for ever after continue a public highway, bridleway, or footway, to all intents and purposes whatsoever; but no inclosures of such old highways, bridleways, or footways, (except in the case of stopping up such useless highways, bridleways, or footways as hereinbefore is mentioned,) shall be made, until such new highway, bridleway, or footway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the Court of Quarter Sessions next after such order as aforesaid shall have been confirmed or enrolled, pursuant to the directions hereinbefore contained:—But from and after the enrolment of such order and certificate, such old highway, bridleway, or footway shall be stopped up, and the soil of such old highway or bridleway sold in the manner, and subject to the reservations and restrictions in the said recited Act mentioned, with respect to highways to be diverted by virtue of the said Act (a).

Old highway to be sold.—By Stat. 13 Geo. 3. c. 78. s. 17, When any such new highways shall be made as aforesaid, the old highway shall be stopped up, and the land and soil thereof shall be sold (b) by the said surveyor, with the

(a) The 5th Section provides, that this Act shall not annul or affect any order or proceeding, made or had previous to the pass-

ing of the Act.

(b) See the observations upon this direction to sell, ante, p. 29, et seq.

approbation of the said justices (*a*), to some person or persons whose lands adjoin thereto, if he, she, or they shall be willing to purchase the same; if not, to some other person or persons for the full value thereof:—But if such old road shall lead to any lands, house, or place, which cannot, in the opinion of such justices respectively, be accommodated with a convenient way and passage from such new highway, which they are hereby authorized to order and lay out, if they find it necessary, then and in such case, the old highway shall only be sold, subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect:—And the money arising from such sale, in either of the said cases, shall be applied towards the purchase of the land where such new highway shall be made:—And upon payment or tender of the money so to be agreed for as aforesaid, and upon a certificate (*b*) being signed by the said two justices, or by the chairman of the said Court of Quarter Sessions, in case the same shall be determined there, describing the lands so sold, and expressing the sum so agreed for, and directing to whom the same shall be paid, and upon the purchaser's taking a receipt (*c*) for such purchase-money from the person entitled to receive the same, by an indorsement on the back of such certificate, the soil of such old highway shall become vested in such purchaser and his heirs:—But all mines, minerals, and fossils lying under the same, shall continue to be the property of the person or persons who would from time to time have been entitled to the same, if such old highway had continued there.

(*a*) See Form, Appendix, No. XLIV.

(*b*) See Form, Appendix, No. XLV.

(*c*) See Form, Appendix, No. XLVI.

As to the sale of common land, by the side of highways; or of the highway, when traversing uninclosed land.—By Stat. 13 Geo. 3. c. 78. s. 20, It is provided, That no common land lying between the fences of any old highway, to be stopped up or inclosed by virtue of this Act, shall be inclosed; and where the land lying between the fences of such highway, not being common land, shall, upon a *medium*, exceed 30 feet in breadth, and not extend to 50 feet in breadth, the same shall not be stopped up or inclosed, until satisfaction shall be made to the owner of such land for so much thereof as shall exceed the said breadth of 30 feet; and if the parties cannot agree in the satisfaction so to be made, the same shall be adjusted by the said justices, or the jury, if a jury shall be impannelled; and if the land between the fences inclosing such highways, not being common land, shall exceed 50 feet in breadth upon a *medium*, or if the said old road, so to be diverted or turned, shall lie through the open field or ground belonging to any particular person or persons, such person or persons and also the person or persons entitled to the land between the fences on the side of such highway, shall respectively hold and enjoy the land and soil of such old highway, and pay to the surveyor for the use of the highways, so much money as shall be agreed upon between the parties; or if they cannot agree, so much as shall be deemed and adjudged by the said justices, or jury, if such jury shall be impannelled as aforesaid, to be adequate to the purchase of it, estimating such highway at 30 feet in breadth upon an average.

As to the sale of footways.—And by Sect. 21, Where any footway shall be diverted by virtue of this Act through the land belonging to the same person who owned the land through which such old footway lay, the same shall

be adjudged and deemed an exchange only, and no satisfaction or compensation shall be made, unless the land to be used for such new footway shall be of greater length and of greater value than the land used for such old footway:—And where the said footway shall not be turned through the lands belonging to the same person, the damage occasioned by such old footway to the lands through which it lay, if the parties interested shall not agree in adjusting the same, shall be adjudged by two indifferent persons, the one to be named by the owner of the land and the other by the said two justices; and if the persons so to be nominated cannot agree therein, they shall choose some third person to adjudge the same, whose determination shall be final; and the money at which such damages shall be so assessed, shall be applied in making satisfaction to the owner or owners of the land through which such new footway shall be made.

Such are the provisions which are now in force for regulating the alteration of public ways. And it is to be observed, that although more extensive powers are conferred upon the justices by the last Statute, than those which they enjoyed under the former Act; yet, by way of compensation to the public, greater notoriety is required to be given to their proceedings.

Under the provisions of *Stat. 13 Geo. 3. c. 78*, there existed no power to discontinue any *unnecessary* highway, without first assigning some new road in lieu thereof. For though by the 22d section of that Act it is declared, “that it shall be lawful for such justices to order such highway or highways which shall appear to them unnecessary, to be stopped up and the soil thereof sold;” yet this is ordered to be done “in such manner and sub-

ject to such restrictions, and such right of appeal to the party or parties aggrieved thereby, as are thereinbefore respectively directed and given concerning the highways to be stopped up or inclosed." And, accordingly, it was held in the case of *Page v. Howard* (a), that this is not a general power, but tied up to a particular case. The power to shut up roads is given, only where there is a new road to be set out. This shews it was meant to be one entire act of the magistrates; that the two clauses (the 19th and 22d sections) make but *one provision*, and that the powers under them were to make but one transaction.

Upon the 19th Section of the Stat. 13 Geo. 3. c. 78, it has been decided that a *new* highway must be set out, *before* the old one can be stopped up. The facts of this case (b) were as follows:—The justices had made the necessary orders for the stopping up of the highway in question, and the same were duly enrolled: but they had substituted as a *new highway*, a lane previously existing, and which they had enlarged and made more commodious for the public, by adding to it along *one* side of the way; but the boundary of the lane on the other side continued the same as it had formerly been. An appeal against the order was made to the justices at their Quarter Sessions, who, however, confirmed it. The case was then brought before the Court of King's Bench; where Lord Ellenborough, C. J. in delivering the judgment of the Court against the order, observed, "This is a question of jurisdiction. The magistrates have only jurisdiction conferred on them in a given case; they may *divert* an old road, so as to make it nearer or more commodious to the public;

(a) Cald. 278.

(b) Welch v. Nash, 8 East, 394.

that is, by *making a new road*. The whole section contemplates that a new highway is to be made in lieu of the old one, which is to be stopped up; and the magistrates can only order the old highway to be stopped up on condition that a new highway has been made and put in a proper state. But what diverting or turning of the old road has there been in this case? or what new highway has been given in lieu of the old one which has been stopped up? The facts are simply these; the magistrates have extinguished and stopped up one old road, and have enlarged another in different parts of it; but the *termini a quo* and *ad quem* and the direction of it remain the same as before. Increasing the width of one old highway is neither diverting another old highway, nor making a new one; and the justices cannot make facts by their determination, in order to give to themselves jurisdiction, contrary to the truth of the case."

But it is not necessary that the way, substituted for the one which is stopped up, should be *entirely* new; for if part of it be new, leading into another old highway, terminating in the same place to which the discontinued highway used to go, this is a sufficiently new highway to satisfy the provisions of the Act. Such was the decision in the case of *De Ponthieu v. Pennyfeather* (a), where the justices had ordered an old highway to be stopped up, and had substituted for it a new footway leading to another old highway: and it was decided, that the justices had complied with the directions of the Act. Gibbs, C. J. remarking, "That if the public be carried to the point of destination partly by a new road and partly by an old one,

(a) 5 Taunt. 634.—1 Marsh. 261, S. C.

the meaning of the Act has been complied with, and the magistrates were justified in shutting up the old way."

It may be remarked, that although under the *Statute* 55 Geo. 3. c. 68, the justices are authorized to stop up *unnecessary* highways; yet if the order be for merely *diverting* a highway, it should seem, that they are still bound by the same restriction, as to the substitution of a new highway, as under the *Stat.* 13 Geo. 3. c. 78, has been deemed necessary in the above cases. For a highway that is to be diverted, appears upon the face of the proceeding not to be *unnecessary*.

It is decided, relative to that branch of the 19th section of 13 Geo. 3. c. 78, which directs, that where any highway hath been diverted and turned above twelve months, either from necessity or from other cause, and acquiesced in, every such highway "shall from henceforth be the public highway to all intents and purposes whatsoever;" that this clause is retrospective only; nor is its operation extended by section 7, of the 55 Geo. 3. c. 68, which incorporates all the clauses and provisions of the former Act (*a*).

As to the consent of the owner.—The Legislature, we have seen (*b*), has provided, that the *consent* of the owner shall be obtained, to allow the new highway to pass through his property; without which consent the alteration cannot be made. Upon this clause it has been decided, in the case of *Rex v. Kirk* (*c*), that the proper person

(*a*) See *Waite v. Smith*, 8 T.R. 133.

(*b*) By stat. 55 Geo. 3. c. 68. s. 2, ante, p. 384.

(*c*) 1 B. & C. 21.

to give such consent, is the owner of the land *at the time when the order for diverting the way is made* by the justices. In this case the justices, by their order, recited that they had found upon view that a certain part of a highway, therein particularly described by reference to a plan annexed to the order, might be diverted and turned, so as to make the same nearer and more commodious to the public; and that they had viewed a course in lieu thereof, therein also particularly described by reference to the same plan, part of which new road was to pass through the lands and grounds of the late Thomas Jones, Esq. The order then stated, that they had received evidence of the consent of the said Thomas Jones in his life-time, to the said part of the new road being made and continued through his lands, by writing under his hand and seal; and directed the road to be diverted and turned accordingly. When the case came before the Court of King's Bench, Abbott, C. J. in delivering judgment, said, "I am of opinion this order must be quashed. It seems to me that the proper construction of the Statute will be, to hold that there must be the consent of the person, who is the owner of the estate at the time when the order is made. Now here it does not appear upon the face of the order, that the person whose consent was obtained, was alive either at the time when the order was made, or at any time after the proceedings had commenced; for it is not stated whether the consent was given before or after the justices had made their view." "Our present decision," he added, "will not affect the question, whether the owner of an estate may revoke a consent given by a former owner who was alive and consenting at the time the order was made; we only decide, that it must appear on the face of the order, that the consent of the person, who is owner at the time when the order is made, has been obtained."

And the consent of the owner must be given under *his own hand and seal*. See the case of *Rex v. The Justices of Kent* (a), where it was held, that an assent to the turning of the road, given under the hand and seal of an agent of the party over whose ground the new road was proposed to be made, was insufficient. It should have appeared on the face of the order, that a valid assent was given under the hand and seal of the party himself.

The order must be made at some Special Sessions.—It is expressly enacted by both the Acts of Parliament, that the order for diverting and turning a highway must be made by the justices at some *Special Sessions*. And by the 2d section of 55 Geo. 3. c. 68, power is given “to the said justices” to stop up unnecessary highways. Upon this clause, it has been decided, that by the “*said justices*” the Legislature clearly means justices assembled at some Special Sessions; and that the fact must appear upon the face of the order. And if such a course is not pursued, the Court of Quarter Sessions is authorized and bound to refuse a confirmation of the order, although no appeal be made to them (b).

I shall proceed to consider the nature of the Special Sessions, required by the Act, and how it is to be convened.

By Section 61, of Statute 13 Geo. 3. c. 78 (c), it is enacted, That it shall be lawful for any two or more justices within their respective limits, to hold any Special Sessions for executing the purposes of the Act; and to

(a) 1 B. & C. 622.

(b) *Rex v. Sheppard*, 3 Barn. & Ald. 414.

(c) See ante, p. 178.

adjourn the same as they shall think fit, *causing notice* to be given of the time and place of holding such Special Sessions and of the adjournments thereof, to the several justices acting and residing within such limits, by the high constable, or other proper officer within the same.

Upon this clause it has been decided, in the case of *Rex v. The Justices of Surrey (a)*, that the notices of holding a Special Sessions under this Act, must be given to the justices of the peace acting within the district by the high constable of the hundred. The words "*other proper officer*" being held to mean an officer of a corporation analogous to a high constable of a hundred; and to meet the case provided for by the 62d section of the Act, which gives to justices in corporations, as well as justices in counties, power to act within the limits of their respective jurisdictions. In the present instance, the notices were served by the clerk of the magistrates, and not by the high constable. The Court observed, "That the enactment, as to the mode of convening the Special Sessions, is not to be considered mere matter of form. It is obvious that the Legislature intended that all the justices acting within the district should have an opportunity of being present, to consider the propriety of making the order. That object will be best obtained by having the notices of holding the Sessions served upon the different magistrates by that officer, whose duty it is to execute the orders of the magistrates, and who is liable to punishment, if he neglects his duty. The clerk to the magistrates might be dismissed from his office, if he neglected to obey the orders of the magistrates; but it does not follow, that he would therefore be liable to punishment."

(a) 5 B. & C. 241.

Where in a still later case (a), the notices of holding the Special Sessions were signed by the chief constables of the hundred, but were served upon the justices by one of the clerks to the magistrates; and at such Special Sessions the order in question was made: it was contended upon the said case of *Rex v. The Justices of Surrey*, that the order was invalid, as, though the notices were signed by the chief constables, yet they were given to or served upon the magistrates by one of their clerks. *Sed per Cur.* "The notices in this case having been signed by the chief constables, and by their authority served upon the justices, were given by the chief constables within the meaning of the Statute."

It is decided by the case of *Rex v. The Justices of Worcestershire* (b), that the provisions of the above section apply to proceedings by order of two justices under *Stat. 55 Geo. 3. c. 68. s. 2*; and that the notice must be given a reasonable length of time previous to the sitting of the Special Sessions. Here the order had been made by the justices at a Special Sessions, holden on Tuesday the 15th September, the precept for which had been issued by them to the high constable on the Saturday preceding, and the notices of which were given by the constable to the justices acting for and residing within the division in which the footway was situate, only on the preceding Monday. After the order was made the several notices prescribed by the *Stat. 55 Geo. 3. c. 68. s. 2.* were duly given; and at the subsequent Quarter Sessions the order was returned to the clerk of the peace in open Court, and application made that it might be confirmed and enrolled, there being no appeal against it; but the

(a) *Rex v. The Justices of Suffolk*, 6 B. & C. 110.

(b) 2 B. & A. 228.

Sessions refused to grant the motion, on the ground that sufficient notice of the time and place of holding the Special Sessions had not been given to the justices of the limits within which the footway was situate. An application was thereupon made to the Court of King's Bench for a *mandamus* to the justices of the county of Worcester, commanding them to confirm the order made by the two justices, and a rule *nisi* to that effect was obtained, but was afterwards discharged with costs, the Court considering that there was a discretion vested in the Court of Quarter Sessions relative to the confirming the orders of the justices; and that such orders ought not to be confirmed, unless they were throughout conformable to the directions of the several Acts of Parliament. And that the notice of the Special Sessions of only one day, which had been given in this case to the justices acting and residing within the limit within which the road in question was situate, was not a reasonable and sufficient notice, upon the proper construction of the Acts. Though the Court would not decide what length of notice ought to be given in such cases.

In one case, however, where the Court of Quarter Sessions confirmed an order of two justices for stopping up a highway, without proof that the order was previously made at a Special Sessions, and an application was made to the Court of King's Bench for a *mandamus* to enter continuances; the Court would not interfere, stating their reason to be, that the Sessions had already decided upon a point peculiarly within their jurisdiction. I allude to the case of *Rex v. The Justices of ———* (a). Campbell moved for a *mandamus*, commanding the defendants to

(a) 1 Chit. Rep. 164.

enter continuances on an appeal against an order made by two justices for stopping up a highway. The appeal came on to be heard at the last Quarter Sessions, when the order was confirmed. It appeared, however, that there was some irregularity in this proceeding, inasmuch as the order could not be confirmed, unless upon proof, that the order for stopping up the highway was made at a Special Sessions. This was necessary according to the authority of a case decided the preceding Michaelmas Term, where there was no such evidence; but on the contrary, it appeared that the order for shutting up the highway was not made at a Special Sessions. *Per Curiam*. The Sessions appear to have decided that point, and we cannot interfere where the Court of Quarter Sessions have decided a point peculiarly under their cognizance. The Rule was therefore refused.

As to the notices to be given after the order is made. I shall proceed to observe upon the *notices* which are required by the *Stat. 55 Geo. 3. c. 69.* to be given before the order by the two justices can be confirmed by the Court of Quarter Sessions. These are of three kinds, and are very well described and their distinctions clearly marked by Lord C. J. Abbott, when giving judgment in the case of *Rex v. The Justices of Kent (a)*. His Lordship observes, referring to the said Act, "By the 2d Section notice is required to be given in three modes: by affixing it by the side of the road; by advertisement in a newspaper; and by affixing it to the church door. It then proceeds 'And the said several notices having been so published, the said order shall, at the Quarter Sessions which shall be holden within the limit where the highway, bridleway, or footway, so diverted and turned or

(a) 1 B. & C. 622.

stopped up shall lie, next after the expiration of *four weeks* from the first day on which such notice shall have been published, be returned to the clerk of the peace, &c. and shall at such Quarter Sessions be confirmed, and by the clerk of the peace enrolled amongst the records of the Court of Quarter Sessions.'—The notice cannot be considered as given until it has been published *once in each of the modes* required by the Act. The computation must therefore be made from the first day on which that description of notice shall be given, which is last published. It is of great importance that these notices should be correct; for, by the 3d Section, an appeal is given to the same Sessions at which the enrolment is to be made."

As to the certificate of the justices.—We have seen (a) that by the 4th Section of *Stat. 55 Geo. 3. c. 68*, it is enacted, That no old highway shall be inclosed until the new one shall be completed and put into good condition and repair, and so *certified* by two justices of the peace upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled. A clause similar to the above is contained in the Act of 13 Geo. 3. c. 78, upon which a question arose, in the case of *De Ponthieu v. Pennyfeather* (b), as to what is to be considered a sufficient certificate by the justices. There, after the order for diverting the highway, three of the justices by whom it was made, signed another order, by which, *after reciting that they were satisfied that the new way was properly made and fit for the reception of travellers*, it was ordered that the old way should be stopped up and sold. It was objected that this recital was not a valid certificate within the meaning of the Act. But the Court

(a) Ante, p. 386.

(b) 5 Taunt. 634.—1 Marsh. 261, S. C.

over-ruled the objection, saying there was a certificate by two magistrates that the new road was made perfect before the old road was stopped.

As to the enrolment of the proceedings.—In the above case of *De Ponthieu v. Pennyfeather*, the orders and proceedings had been returned to the clerk of the peace, and were not entered or transcribed upon any roll (no records of that Court of Quarter Sessions being so enrolled), but they were kept as part of the rolls of the Court, and strung together with other proceedings in the office, in the same manner as all records of the same Court of Quarter Sessions were kept and preserved. An objection was taken that this was not such an enrolment of the orders and certificate as the Act requires; but was over-ruled. *Per Gibbs, C. J.* "It is very questionable, whether by the term 'enrolment' is here meant any thing more than placing the orders among the records of the Sessions; but supposing it to mean an actual transcript, the Act is herein merely directory to the officer; and it cannot be, that all who go that way should be rendered trespassers, by the neglect of the officer to perform his duty."

Forms of proceedings.—Great care should be used, in drawing up the orders and notices required by the Acts, to follow, as closely as possible, the forms annexed to the respective Acts. For, in the case of *Davidson v. Gill* (a) it was decided, that an order, made by two justices, under

(a) 1 East, 64. And see *Rex v. Kenyon*, 6 B. & C. 640, where it is decided, that the justices must state distinctly, on the face of the order, in what parish, &c. the highway is situate, and must also

describe its length and breadth. And *Semble*, that there must be a separate order for stopping up each individual way; so that two or more ways cannot be comprised in one order. *Ibid.* p. 645.

the *Stat.* 13 Geo. 3. c. 78. s. 19, for stopping up an old footway, and setting out a new one, must follow the form prescribed in the Schedule annexed to that Act, and set forth the length and breadth of the new footway: otherwise it will be no answer to a justification of a right of way pleaded to an action of trespass, brought by the owner of the soil over which the old way led. The Statute requires that the forms set forth in the Schedule "*shall* be used on all occasions, with such additions and variations *only* as may be necessary to adapt them to the particular exigencies of the case." Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding.

As to the power to appeal.—I now come to the consideration of the right to appeal against the order of the justices, which is provided for by the Legislature. By the 3d Section of *Stat.* 55 Geo. 3. c. 68 (*a*), an appeal is given to the Quarter Sessions at which the order for diverting or stopping up a highway is thereby ordered to be confirmed, to any person injured or aggrieved by such order or proceeding, upon giving notice to the surveyor.

Upon this clause it has been decided, that in the notice of appeal against the order of two justices for stopping or diverting a highway, it is necessary to state, that the party intending to appeal is injured or aggrieved by the order. See the case of *Rex v. The Justices of Essex* (*b*), where Abbott, C. J. observed, in giving judgment, That the matter in question, viz. the stopping up

(*a*) See ante, p. 386.

Riding of Yorkshire, 7 B. & C. 678, S. P.

(*b*) 5 B. & C. 431.—And see *Rex v. The Justices of the West*

or diverting of a public highway, affects, in a certain degree, all his Majesty's subjects; and therefore, as the Statute has not given a right of appeal to all persons, but merely to the party aggrieved, we must suppose that the Legislature intended to confer that privilege upon those persons alone, who have sustained some special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever.

Under the clause for appeal contained in the 19th Section of the *Stat. 13 Geo. 3. c. 78*, which enacted, That the appeal should be at the next Quarter Sessions after the order had, upon giving ten days' notice, if there were time for such notice; and if not, then to the next subsequent Sessions: It was held in one case (*a*), that the appeal might be made at the Sessions next after the party *had notice of the order*; although that Sessions was not the one immediately succeeding the making of the order. This decision is, however, overturned by the later cases of *Rex v. The Justices of Pembrokeshire* (*b*) and *Rex v. The Justices of Staffordshire* (*c*). In which last case it was expressly decided, that the appeal must be made to the Quarter Sessions next after the order made, without reference to any *notice* received by the appellant of such order. These decisions appear to be applicable to the appeal given in the case of proceedings upon writ of *ad quod damnum*, though the time for appeal upon an order by two justices is altered by *Stat. 55 Geo. 3. c. 68*.

It should seem, that if two orders be made by the justices, the one for diverting and turning a public way, and

(*a*) *Rex v. The Justices of Staffordshire*, 7 T. R. 81.

(*b*) 2 East, 213.

(*c*) 3 East, 151.

the other for stopping up the old way, they are to be considered as so distinct from one another, that an appeal may be made against each *separately*; and the time within which to appeal against either order must run from its individual commencement.

Thus, two justices at a Special Sessions on the 20th of June made an order, that a public footway should be diverted and turned; and upon the 4th July following made another order, by which they directed the old footway to be stopped up—against which orders an appeal was made at the next Michaelmas Quarter Sessions, and not at the Midsummer Quarter Sessions, which were holden on the 11th of July: on which account the justices dismissed the appeal. When the case was brought before the Court of King's Bench, it was contended, on the part of the justices, that the time for appeal ought to be reckoned from the *first* order, because the first order comprehended every thing which was contained in the second, and therefore the second was perfectly unnecessary; and the justices, after making the first, were *functi officio*. On the other hand, it was denied that the order for diverting and turning included the stopping up, for so long as there is only an order for diverting and turning, the public have a right to go along the old footway, and here the justices have made a separate order for the stopping up; and the 19th Section of the *Stat.* 13 Geo. 3. c. 78, expressly gives an appeal *where any footway shall be ordered to be stopped up*; so that, if the appeal were out of time for the first order, it would be good for the second. Which was agreed to by the Court, who said, "The *gravamen* as to the public is the stopping up; but the appeal must be confined to the latter order (*a*)."

(a) *Rex v. The Justices of Hertfordshire*, 3 M. & S. 459.

As to the sale of the old highway.—In the case of *Rex v. Kenyon* (a), two justices, by an order made in petty sessions, certified that three several footways did appear to them to be unnecessary; and therefore they did order the said footways to be stopped up. It was contended, that this order was incorrect, for not providing for the sale of the footpaths. And the objection was admitted by the Court. *Per Bayley, J.* “As to the other objection, I agree that under the 13 Geo. 3. c. 78, no power is given to stop up any highway, bridleway, or footway, unless another is substituted for it. But the 55 Geo. 3. c. 68. s. 2, provides first for the case of substituting a new way for an old one; and then follows the provision upon which this question turns, ‘and also when it shall appear upon the view of any two or more of the said justices of the peace, that any public highway, bridleway, or footway is unnecessary, it shall and may be lawful by order of such justices, or any two of them, to stop up and to sell and dispose of such unnecessary highway, bridleway, or footway.’ It is argued, that the Legislature never intended to extend this power of sale to an old footway; but referring to the former statute 13 Geo. 3. c. 78, it seems clear that such was their intention. By that Statute, no power was given to stop up an old footway without making a new one; but whenever that was done, the old footway was, in some mode or other, to be disposed of, although not by sale. The subsequent Statute having given power to stop up unnecessary footways, it was reasonable that the Legislature should make a provision for converting them into money for the use of the public. If the justices are to make an order to stop up and sell,

(a) 6 B. & C. 640.

it cannot be good unless it applies to both. The provision for each of these acts must be made at the same time, or if that be otherwise, still it is necessary that the order should state the length and breadth of the road stopped up, in order that it may be known what is to be afterwards sold."

As to costs.—Section 80 of the 13 Geo. 3. c. 78, gives an appeal and awards costs, under certain restrictions, to any person aggrieved by proceedings under the Act, and for which no particular method of relief had been therein already appointed. But as an appeal and other mode of relief is given by the 19th section, in the particular case of the diverting of ways by the order of two justices, the 80th section is not applicable to these proceedings. Therefore, where notice of appeal against an order for diverting a footway was given, and the order was not filed with the clerk of the peace for enrolment, but the justices gave the appellant notice that they intended to abandon the order; it was held, that the justices at the Sessions had no power to award to the appellant the costs of preparing to try the appeal, which he claimed under the 80th section (a).

It has before been stated, that ways are frequently created and destroyed under Inclosure Acts or other Acts of Parliament. In order to ensure sufficient publicity and consideration in the stopping up of old ways under Inclosure Acts, it is provided by the General Inclosure Act (41 Geo. 3. c. 109. s. 8,) that no road through old inclosures shall be stopped up without the order of two

(a) *Rex v. Wing*, 4 B. & C. 184.

justices, and subject to appeal as if originally made by such two justices.

And by 11th *Section* of the same Act, it is enacted, That all roads, ways, and paths over, through, and upon the lands and grounds intended to be inclosed, which shall not be set out by the commissioners as directed by the 8th and 10th sections, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided, allotted, and inclosed, and shall be divided, allotted, and inclosed accordingly.

Now the 8th section appears evidently to allude to the provisions contained in the Highway Acts for diverting and stopping up highways, and it should seem, therefore, to be the intention of the Legislature that the notices required to be given by the latter Act, should also be given in proceedings under this 8th section. But the necessity of giving such notices has never been actually decided upon, although in the case of *Rex v. Townsend* (a), Abbott, C. J. seems to lean very strongly to that opinion.

In this case it was held, that the time for appeal may be *enlarged* by the provisions of the particular Inclosure Act. For there, by a clause in an Inclosure Act, a commissioner was authorized to stop up any way, provided it be done by the order and with the concurrence of two justices, and that order was to be subject to an appeal in like manner and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved

(a) 5 B. & A. 420.

was to be at liberty to appeal at any time *within six months* after the cause of complaint. Under this Act, the commissioner, with the concurrence and order of two justices, stopped up a road, without giving the public notices required by *Stat. 55 Geo. 3. c. 68*. And it was decided, that a party aggrieved might, under these circumstances, appeal at any time within six months, as he was unable to appeal under the *55 Geo. 3. c. 68*, for want of the notices required to be given by that Act; and from the publishing of which the time for appeal commences.

And in the case of *Logan v. Burton* (a), it was decided, that the clause in the General Inclosure Act (41 Geo. 3. c. 109. s. 8.) which requires the concurrence of two justices to the diverting or stopping up of any *old inclosed ways* by commissioners under Inclosure Acts, provided the particular Inclosure Act authorize the stopping up or diverting of old inclosed ways, extends to old inclosed ways *which continue along the open fields* intended to be inclosed (b). And it was also decided, that this section extends to footways as well as carriage ways; although it was contended by the counsel, that there was a difference between the two kinds of way, and that footways were too insignificant to require that deliberate caution to their extinction, which, it was alleged, the Legislature meant to confine to carriage-ways (c). How contrary to

(a) 5 B. & C. 513.

(b) And therefore these ways cannot be extinguished under the 11th section of the General Inclosure Act. See *Harber v. Rand*, 9 Price, 58.

(c) See *Harber v. Rand*, 9 Pri.

58, where this reasoning was also urged, but without success. For it was there decided, that nothing short of an order of the magistrates, *expressly stopping up the footpath*, will satisfy the Statute.

all established law upon this subject such reasoning is, I have endeavoured to shew in the commencement of this Treatise.

As to the mode of Proceeding to be adopted relative to the Diversion, &c. of Highways, subsequent to the Justices' Order.

I SHALL now briefly notice the various methods whereby the order of the justices for diverting or stopping up a highway, and the other concurrent acts, may be arraigned, and their validity questioned, either before or after confirmation by the Court of Quarter Sessions.

In the first place,—The validity of the proceedings had before the two justices, even after they have been confirmed at the Quarter Sessions, can be tried in an action of trespass, which may be brought by the owner of the soil against any one who shall attempt to use the *old way*. This was done in the case of *De Ponthieu v. Pennyfeather* (a), where the regularity of the order of the justices, the sufficiency of their certificate as to the new way being in good condition, and the enrolment of the whole proceedings, were discussed. And in another case (b), it was decided, that if the orders of justices for stopping up, &c. highways, are not properly made according to the directions of the Act; as where, under the 13 Geo. 3. c. 78, the justices stopped up a highway, substituting for it only another old highway, instead of a *new highway*, as required by that Act, such orders may be questioned

(a) 5 Taunt. 634. 1 Marsh.
261. S. C.

(b) Welch v. Nash, 8 East, 394.

in an action of trespass, notwithstanding they were confirmed on appeal to the Quarter Sessions. Again, in the case of *Davidson v. Gill* (a), the whole proceedings were set aside for a material informality, in an action of trespass, although they had been confirmed at the Quarter Sessions.

Secondly.—It sometimes happens, that the Court of Quarter Sessions refuse to confirm the order of the justices, although no appeal be made to them against the same, if they perceive any irregularity in the proceeding. That they have this discretionary power with regard to the confirmation of the order, and that they are bound to exercise it, is decided in the case of *Rex v. The Justices of Worcestershire* (b). In case of such refusal, the proper course to be pursued in order to enforce the Court of Quarter Sessions to confirm the proceedings of the two justices, and thus to bring before a superior tribunal the review of the decision of that Court, is by motion in the Court of King's Bench for a *mandamus*, commanding the justices of the county to confirm the order made by the two justices for diverting and stopping up the road. This was the mode pursued in the above case of *Rex v. The Justices of Worcestershire*, and also in the case of *Rex v. The Justices of Surrey* (c), and in the case of *Rex v. The Justices of Suffolk* (d).

Thirdly.—If an appeal be actually lodged against the order of the two justices, but the Court of Quarter Sessions refuse to hear such appeal, then the party appealing must proceed by motion to the Court of King's Bench

(a) 1 East, 64.

(b) 2 B. & A. 228.

(c) 5 B. & C. 241.

(d) 6 B. & C. 110.

for a *mandamus*, commanding the justices of the county at the next General Quarter Sessions of the Peace to receive the said appeal and cause continuances to be entered, and to hear and determine the merits of the appeal. Such was the method adopted in the case of *Rex v. The Justices of Staffordshire* (a), in the case of *Rex v. The Justices of Pembrokeshire* (b), and in *Rex v. The Justices of Staffordshire* (c), and in *Rex v. The Justices of Essex* (d), and in another case of *Rex v. The Justices of Essex* (e), in which the proceeding for diverting the way was by writ of *ad quod damnum*, and in the case of *Rex v. The Justices of Hertfordshire* (f).

Lastly.—When the Court of Quarter Sessions, having received the appeal, have heard and determined upon its merits, and either confirmed or quashed the order of the justices, a review of the decision below can only be had by removing the whole proceedings into the superior Court by writ of *certiorari*, accompanied by a motion to quash the order of the Court of Quarter Sessions. This was the course adopted in the case of *Rex v. Kirk* (g), and also in the cases of *Rex v. Townsend* (h), *Rex v. Sheppard* (i), and *Rex v. Kenyon* (k).

SECONDLY: *The enactments relating to the Diversion and Extinction of Turnpike Roads.*

Power to alter and improve turnpike roads.—By Stat. 9 Geo. 4. c. 77. s. 9, The trustees of any turnpike road

(a) 7 T. R. 81.

(b) 2 East, 213.

(c) 3 East, 151.

(d) 5 B. & C. 431.

(e) 1 B. & A. 373.

(f) 3 M. & S. 459.

(g) 1 B. & C. 21.

(h) 5 B. & A. 420.

(i) 3 B. & A. 414.

(k) 6 B. & C. 640.

are authorized and empowered (subject to the restrictions in the said recited Acts (a) and this Act contained), to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof; and to divert, shorten, vary, alter, and improve the course or path of any of the said several and respective roads, or any part or parts thereof, upon, in, through, or over any private lands, grounds, or hereditaments, making or tendering satisfaction to the owners thereof and persons interested therein, for the same, or for any damage they may sustain thereby; and also upon, in, over, or through any common or waste lands, without making any satisfaction for such common or waste lands, in such manner as they shall think proper; so that any such road shall not exceed sixty feet in width, together with such footpath, causeways, bridges, arches, banks, culverts, ditches, drains, and fences on the line of such road, as they shall think necessary or expedient: And it shall also be lawful for such trustees, and for their surveyors or surveyor and workmen, with or without carts or carriages, from time to time to enter upon the lands and grounds or hereditaments through which or whereupon such road, footpath, causeways, bridges, arches, banks, culverts, ditches, drains, and fences is or are intended to be made or pass, and also upon any adjoining lands or grounds, to stake out the same in such manner as such trustees shall think necessary or expedient, without being deemed a trespasser or trespassers, and without being subject or liable to any fine, penalty, or punishment for entering or continuing upon such lands or premises respectively, for any of the pur-

(a) 3 Geo. 4. c. 126.—4 Geo. 4. c. 95.—and 7 & 8 Geo. 4. c. 24.

poses of the Act, for making or maintaining any such turnpike road:—And if any person shall pull up, remove, or destroy any stakes or other marks used for the purposes aforesaid, every person so offending shall forfeit and pay for every such offence any sum not exceeding £5.

As in other instances, so also in the case of the diversion, &c. of turnpike roads, the trustees are not liable to an action for any consequential injury, resulting from an act which they are authorized to do, unless they are guilty of careless and negligent, or wanton and oppressive conduct.

Thus in the case of *Boulton v. Crowthor* (a), which arose under the former Act of 3 Geo. 4. c. 126, (the provision in which is similar to the above clause, as far as is material to this case), it appeared that the road, adjoining to the plaintiff's pleasure ground, had been lowered in one part and raised in another, by the order of the trustees; so that the entrance gates to his premises situate next those parts of the road could not be used by persons coming to his premises with carts and other carriages, and it also appeared that part of the materials of the road had fallen into the plaintiff's premises, and damaged his hedge and plantations. Some evidence was given to shew that the injury to the plaintiff accrued partly from the work having been done carelessly and negligently, but it was contended by the plaintiff's counsel, that the plaintiff was entitled to recover, whether the work was done properly or not. It was said, that

(a) 2 B. & C. 703.

although the trustees had not taken any of the plaintiff's land, yet as they had rendered it of less value to him in consequence of the raising of the road in some parts and lowering it in others, they were bound to render satisfaction, although the Act had not provided a compensation for a consequential damage accruing to a party, where no part of his land had been taken. But at the trial before Park, J. that learned Judge was of opinion that the action was not maintainable, if the trustees used proper care and caution, and did nothing oppressive or arbitrary; and he directed the jury to find for the plaintiff, if they were of opinion that the trustees acted arbitrarily, oppressively, or carelessly; but if they were of a different opinion, then to find for the defendant. The jury having found for the defendant, a motion was afterwards made in the Court of K. B. for a new trial, which was refused. The reasons for the judgment of the Court may be thus stated. The act done by the trustees was an act which they had an authority under the Statute to perform. Before the Act of Parliament passed, the lowering and levelling of hills had become one of the most common modes of improving the course of the public roads; therefore the lowering of hills in a public road must be considered an act which is authorized to be done under the terms "improve and alter the course or path of the road." Then if the act done were authorized to be done, an individual who has sustained some special injury from the act done, cannot maintain an action at the common law. If, indeed, the trustees exceed the authority entrusted to them, or abuse that authority by acting arbitrarily, wantonly, or oppressively, or carelessly and negligently, then they would be liable. But the act being in itself lawful, can only become un-

lawful in consequence of the mode in which it is carried into execution (a).

Lands may be purchased, &c.—By *Stat. 3 Geo. 4. c. 126. s. 84*, It shall be lawful for the trustees of any turnpike road to treat, contract, and agree with the owners of and persons interested in any lands, tenements, hereditaments, and premises, with their appurtenances, which they shall deem necessary to purchase for the purpose of widening, diverting, altering, and improving such road, for the purchase thereof, and for the loss or damage such owners or persons may otherwise sustain:— And it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other persons whomsoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled in reversion, remainder, or expectancy after them, and for and on behalf of their *cestui que trusts*, whether fêmes covert, infants, or issue unborn, lunatics, idiots, or other person or persons whomsoever, and to and for all fêmes covert who are or shall be seised of or interested in their own right, and to and for all and every person and persons whomsoever, who are or shall be possessed of or interested in any such lands, tenements, hereditaments, or premises, or who shall sustain any damage as aforesaid, to contract with the said trustees for the sale thereof, or for the satisfaction to be made for the same, or for such damages as aforesaid; and by conveyance, lease and release, or

(a) See the *Plate Glass Company v. Meredith*, 4 T. R. 794; and *Sutton v. Clarke*, 6 Taunt. 29.

bargain and sale, to sell and convey unto the said trustees all or any such lands, tenements, hereditaments, or premises, or any part thereof, for the purposes aforesaid; and all contracts, sales, and conveyances which shall be so made shall be good, valid, and effectual to all intents and purposes, without fine or recovery, and shall be a complete bar to all estates tail and other estates, rights, titles, trusts, and interests whatsoever, any law, statute, usage, custom, or other matter to the contrary notwithstanding; and all such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees, committees, executors, administrators, and all other persons, shall be and are hereby indemnified for what they or any of them shall do by virtue or in pursuance of this Act.

By *Section 85*, If any such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees, committees, executors, administrators, or any other person or persons interested in any such lands, tenements, hereditaments, or premises, or sustaining any damage as aforesaid, upon notice (a) to him, her, or them given or left in writing at the dwelling-house or dwelling-houses, place or places of abode of such person or persons, or of the principal officer or officers of any such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, or at the house of the tenant in possession of

(a) Upon a similar clause in a former Act, the Court of King's Bench quashed the inquisition of the jury and the order of the trustees, because it did not ap-

pear upon the face of the proceedings, that any notice had been given to the owners of the land. *Rex v. Bagshaw and others*, 7 T. R. 363.

any such lands, tenements, hereditaments, or premises, shall for the space of 30 days next after such notice given or left as aforesaid, neglect or refuse to treat, or shall not agree in the premises, or by reason of absence shall be prevented from treating, then and in every such case the said trustees shall cause such damage, value, or recompence to be inquired into and ascertained by a jury of twelve indifferent men of the county wherein such lands, tenements, hereditaments, or premises do lie; and in order thereto, the said trustees are hereby empowered and required from time to time, as occasion shall require, to summon and call before such jury, and examine upon oath, all and every person and persons whomsoever who shall be thought necessary and proper to be examined concerning the premises, (which oath the said trustees, or any or either of them, are and is hereby empowered to administer); and such trustees shall, by ordering a view or otherwise, use all lawful ways and means, as well for their own as for the said jury's information in the premises; and after the said jury shall have inquired of and assessed such damage and recompence, they the said trustees shall thereupon order the sum or sums of money so assessed by the said jury to be paid to the said owners or other persons interested, according to the verdict or inquisition of such jury; and such verdict or inquisition, and judgment, order, and determination thereon, shall be final, binding, and conclusive to all intents and purposes against all parties and persons whomsoever, claiming or to claim any estate in possession, reversion, or otherwise, their heirs and successors, as well absent as present, infants, femmes-covert, idiots, lunatics, and persons under any other disability whatsoever, bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, as well as all and every person

and persons whomsoever:—And for summoning and returning such juries, the said trustees are hereby empowered to issue their warrant or warrants in writing to the sheriff of the county wherein such lands, tenements, hereditaments, or premises do lie, commanding him to impanel, summon, and return an indifferent jury of twenty-four persons, qualified to serve upon juries, to appear before such trustees at such time and place as in such warrant or warrants shall be appointed; and such sheriff, or his deputy or deputies, is and are hereby required to impanel, summon, and return such number of persons accordingly; and out of the persons so impanelled, summoned, and returned, or out of such of them as shall appear upon such summons, the said trustees shall and are hereby empowered and required to swear or cause to be sworn twelve men, who shall be a jury for the purposes aforesaid; and in default of a sufficient number of jurymen, the said sheriff, or his deputy or deputies, shall return other honest and indifferent men of the standers-by, or that can be speedily procured to attend that service, to the number of twelve; and all persons concerned shall have their lawful challenges against the said jurymen, when they come to be sworn, but shall not challenge the array:—And the said trustees acting in the premises, shall have power, from time to time, to impose any reasonable fine or fines upon such sheriff, his deputy or deputies, bailiff or bailiffs, agent or agents, making default in the premises, and on any of the persons that shall be summoned and returned on such jury, and who, without sufficient excuse, shall not appear, or appearing shall refuse to be sworn on the said jury, or being sworn shall refuse to give, or shall not give their verdict, or in any other manner wilfully neglect their duty therein, contrary to the true intent and meaning of this Act, and on

any of the persons who, being required to give evidence before the said jury, shall, without sufficient excuse, refuse or neglect to appear, or appearing shall refuse to be sworn and examined or to give evidence, so that no one fine be more than £10 on any such sheriff, deputy, bailiff, or agent, nor more than £5 on any other person, for one offence.

By *Section 86*, Every sum of money or recompence to be agreed for or assessed as aforesaid, shall be paid out of any monies in the hands of the said trustees, or out of the tolls granted by the Act for making and repairing such turnpike road, or out of the monies to be borrowed on the credit thereof, to the party or parties, or person or persons respectively entitled thereto, or to their agents, or into the Bank of England (a) in manner by this Act directed, (as the case may be); and upon such payment to such parties or persons, or their agents, or into the Bank of England, and after thirty days' notice thereof given to such parties or persons, or to their agents, or left at their respective usual places of abode, or with the tenant or tenants in possession of such lands, tenements, hereditaments, and premises, then such lands, tenements, hereditaments, and premises respectively, shall be vested in such trustees, and shall and may be taken and used for the purposes of such Act; and such lands, and the site of such lands, tenements, hereditaments, and premises, shall be laid into and made part of the road, in such manner as the said trustees shall direct, and shall be repaired and kept in repair by such trustees, by the same ways and means as any other part of the road under their management is or ought to be kept in repair; and all

(a) This provision is repealed, 7 & 8 Geo. 4. c. 24. See post, and a new one substituted by Stat. page 430.

parties and persons whomsoever shall be divested of all right and title to such lands, tenements, and hereditaments:—And after such new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees may thereby become useless or unnecessary, *or (a) shall or may be stopped up and discontinued as public highways, (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals,) and shall be vested in and shall and may be sold and conveyed by the said trustees (b),* in the manner herein mentioned, for the best price that can be gotten for the same, and the money arising by such sale shall be applied for the purposes of the Act for repairing and maintaining such turnpike road: And all conveyances, being executed by the said trustees, and enrolled in the office of the clerk of the peace for the county, city, or place wherein such road shall be situate, shall be good and effectual in the law to all intents and

(a) Sic.

(b) In *Davidson v. Gill*, Lord Kenyon observed, that the soil of a turnpike road was not vested in the trustees, but remained in the persons who were entitled to it before the Act passed by which they were appointed; so that they had not power, as owners of the soil, to consent to the diversion of another way into their road. The

trustees have only the controul of the road. See 1 East, 69. But for the purpose of effecting the sale hereby directed, it seems that the Legislature has *expressly vested* the soil and inheritance in the trustees. See the observations upon the power of sale contained in the Highway Act, ante, p. 29, et seq.

purposes whatsoever; Or it shall be lawful for the said trustees, instead of making such sale as aforesaid, to give up to the owners or proprietors of any adjoining lands, tenements, or hereditaments, whose building, land, or ground shall be had or taken for the purposes of this Act, any part or parts of the present or old roads, in lieu of and in exchange for the same, in such way and manner as such trustees and owners or proprietors shall agree upon and think fit.

We see that, by the above clause, the trustees shall and may stop up and discontinue any turnpike road for which a new one has been substituted, saving however certain ways, which it may be *deemed proper* to keep open. It has been held (a), that this exception does not take away from the trustees the power of stopping up roads of the nature therein mentioned, but leaves it *to their discretion* to do so or not; and therefore, that the trustees had authority to stop up and restore to the owner of the adjoining land an old road, although leading to a church, &c. to which the new road did not immediately lead.

Provision for payment of mortgages on land purchased.
By Statute 7 & 8 Geo. 4. c. 24. s. 7, If any lands, tenements, or hereditaments, which shall be purchased for the purposes of any Act for making or maintaining turnpike roads, shall be in mortgage to any person, then and in such case the trustees shall and they are hereby required to pay or cause to be paid to the mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, upon application in writing made to the trus-

(a) De Beauvoir v. Welch, et al. 7 B. & C. 266.

tees or their clerk, signed by such mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, such sum or sums of money as shall be agreed for, ascertained, and determined, for the purchase of such lands, tenements, or hereditaments, or a competent part thereof:—And such sum or sums of money, when so paid, shall be and be deemed to be in discharge of the principal money, or part thereof, due on such mortgage or mortgages;—And acknowledgment of the receipt thereof shall be made by endorsement on the mortgage deed or deeds, signed by such mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, in the presence of one or more credible witness or witnesses; and such endorsement shall be and be deemed to be a full and sufficient discharge to the trustees from the mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, and also a full and sufficient discharge to the mortgagor or mortgagors, his, her, or their heirs, executors, administrators, or assigns, from the mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, for so much money as shall be expressed in such endorsement.

How expences of jury and witnesses are to be borne.—By *Statute* 3 Geo. 4. c. 126. s. 87, In case any jury or juries to be summoned and sworn pursuant to the directions and authority of this Act, shall give in and deliver a verdict or assessment for more money, as a recompence or satisfaction for the right, interest, or property of any person or persons in any such lands, tenements, hereditaments, or premises, or for any loss or damage to be by him, her, or them sustained, than what shall have been agreed to and offered by such trustees before the summoning or returning the said jury or juries, as a recom-

pence or satisfaction for any such right, interest, or property, or for any loss or damage as aforesaid, then and in such case the costs and expences of summoning and maintaining the said jury and witnesses, and all other expences attending the hearing and determining such difference, shall be borne and paid by the treasurer to the trustees, out of any money which shall then be in his hands, or out of any monies to be received by virtue of the Act for repairing and maintaining such turnpike road, such costs and expences to be settled and ascertained by some justice of the peace for the county wherein the dispute shall have arisen, not interested in the matter in question, who is hereby authorized and empowered to settle and determine the same, and to make an order on the treasurer of the trustees liable thereto for the payment thereof;—But if any such jury or juries so summoned and sworn as aforesaid, shall give in and deliver a verdict or assessment for no more or for less money than shall have been agreed to and offered by the trustees before the summoning and returning of the said jury or juries, as a recompence and satisfaction for any such right, interest, or property in any such lands, tenements, hereditaments, or premises, or losses or damages as aforesaid, then the costs and expences of summoning and maintaining the said jury and witnesses, and all other expences as aforesaid, shall be borne and paid by the person or persons with whom such trustees shall have such controversy or dispute; which said costs and expences, having been ascertained and settled by some justice of the peace for the county wherein the cause of dispute shall arise, not interested in the matter in question, (who is hereby required to examine and settle the same,) shall and may be deducted out of the money so assessed and adjudged, as so much money advanced to and for the use of such

person or persons, and the payment or tender of the remainder of such monies shall be deemed and taken, to all intents and purposes, to be a payment or tender of the whole sum or sums so assessed and adjudged; or otherwise such costs and expences, in case the same or any part thereof shall exceed such damages, and shall not be paid upon demand, after being so ascertained and settled as aforesaid, may be recovered by the said trustees by the ways and means hereinafter provided for the recovery of penalties and forfeitures (a):—Provided always, that in cases where any person or persons shall, by reason of absence, have been prevented from treating, such costs and expences shall be borne and paid by the said trustees in manner aforesaid.

New road to be a highway.—Old road to be stopped up and the land sold.—By Section 88, When any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any Act of Parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such:—And the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees to some person or persons whose lands adjoin thereto, as hereinafter mentioned with regard to pieces of ground not wanted (b):—But if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the said trustees, be conveniently accommodated with a passage from such new road,

(a) See sect. 141.—Post, Chapter VI. Section III.

(b) See ante, p. 420, note (b).

which they are hereby authorized to order and lay out if they find it necessary, then and in such case the old road shall be sold, but subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect; and the money arising from such sale, in either of the said cases, shall be applied towards the purchase of the land where such new road shall be made, or in the same manner as the tolls arising on such road, as the trustees thereof shall think fit; and upon the completion of any contract whereby any part of the old road shall be given in payment for the value of the ground taken for the new road, or upon payment of the price of any part of the old road, the soil of such old road shall become vested in the purchaser thereof and his heirs; but all mines, minerals, and fossils lying under the same shall continue the property of the person or persons who would from time to time have been entitled to the same, if such old road had continued.

Power to sell unnecessary pieces of land, or tenements.
By Section 89, Where the trustees of any turnpike road shall have purchased, or shall be possessed of any piece or pieces of ground, not wanted for the purposes of such road, it shall be lawful for such trustees to sell and dispose of the same:—Provided always, that the said trustees, before they shall sell and dispose of any such piece or pieces of ground not wanted for the purposes of such turnpike road as aforesaid, to any other person or persons, shall first offer the same to the person or persons of whom the same shall have been purchased, or to the person or persons whose lands shall adjoin thereto; and if such person or persons respectively shall then and thereupon refuse, or shall not agree (except with respect to or on account of the price thereof) to purchase the same re-

respectively, on an affidavit being made and sworn before a master or masters extraordinary in the High Court of Chancery, or before one of his Majesty's justices of the peace for the county where such ground is situate (who are hereby respectively empowered to take such affidavit) by some person or persons no way interested in the said piece or pieces of ground, stating that such offer was made by or on the behalf of such trustees, and that such offer was then and thereupon refused, or was not agreed to by the person or persons to whom the same was made, such affidavit shall, in all courts whatsoever, be sufficient evidence and proof that such offer was made, and was refused or not agreed to by the person or persons to whom such offer was made (as the case may be):—And in case such person or persons shall be desirous of purchasing such piece or pieces of ground, and he, she, or they and the said trustees shall differ or not agree with respect to the price thereof, then the price or prices thereof shall be ascertained by a jury, in manner in this Act directed with respect to disputed value of premises to be taken and used in pursuance of this Act; and the expence of hearing and determining such difference shall be borne and paid in manner hereinbefore directed with respect to such purchases made by the said trustees, *statutis modis*:—And the money to arise by the sale or sales of such pieces or parcels of ground shall be applied by the trustees to the purposes of the Act for repairing and maintaining such turnpike road, but the purchaser or purchasers thereof shall not be answerable or accountable for any misapplication or non-application of such money; And the conveyances of such piece or pieces of ground shall be made to the purchaser or respective purchasers thereof, and in such manner and form as is hereinbefore

directed (a) with respect to the conveyances to be made of the land constituting any part of the road hereinbefore directed to be sold.

By *Stat. 4 Geo. 4. c. 95. s. 63*, In case the trustees for making or maintaining any turnpike road shall become possessed of any tenements or hereditaments which are useless or unnecessary for the purposes of such road, it shall be lawful for the said trustees to sell and dispose of the same, in such and the same manner as by the said recited Act (b) they are authorized and empowered to do, in the cases of any land or ground not wanted for the purposes of such road.

Form of conveyance, and which shall be made at the expence of the trustees.—By *Stat. 4 Geo. 4. c. 95. s. 55*, It is enacted, that all sales and conveyances of any lands, tenements, or hereditaments, to be sold by the trustees of any turnpike roads, shall be made at the expence of such trustees, and shall be expressed in the following or some similar form of words, as the circumstances of the case may require; *videlicet*,

We, — of the trustees or commissioners acting in execution of an Act passed [here insert the title of the Act appointing them] in consideration of the sum of— to us paid by [name of the purchaser] do hereby grant and release to the said [name of the purchaser] all [describing the premises to be conveyed,] and all our right, title, and interest to and in the same, and every part thereof, To hold to the said [name of the purchaser,] his heirs, executors, administrators, and assigns for ever,

(a) This is now regulated by 4 Geo. 4. c. 95. s. 55, *infra*.

(b) 3 Geo. 4. c. 126.

by virtue and according to the true intent and meaning of an Act passed in the fourth year of the reign of King George the Fourth, intituled, "An Act" [here set forth the title of this Act (a).] In witness whereof we have hereunto set our hands and seals, this — day of —.

Trustees not to pull down houses, or deviate more than 100 yards, or take in gardens, &c. without consent.—By Section 65, It shall not be lawful for the trustees of any turnpike road, in altering or diverting the course of any part of the turnpike road under their care and management, to take or pull down any dwelling-house or other building, or in altering or diverting the course of any part of the turnpike road under their care and management, to deviate over any inclosed lands or grounds more than 100 yards from the line or course of such turnpike road, without the consent in writing of the owner or proprietor, or of the person or persons hereby authorized to act for and on behalf of the owner or proprietor of such dwelling-house or other building, or of such lands or grounds, or to take in or make use of any garden, yard, or paddock, or any park, planted walk, or avenue to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, or any part thereof respectively, without the like consent of the owner or proprietor thereof, or of the person or persons hereby authorized as aforesaid, first had and obtained:—And it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other persons whomsoever,

(a) See the title of this Act, ante, p. 188, note (a).

not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled in reversion, remainder, or expectancy after them, and for and on behalf of their cestuique trusts, whether *femes-covert*, infants, or issue unborn, lunatics, idiots, or other person or persons whomsoever, and to and for all *femes-covert* who are or shall be seised of or interested in their own right, and to and for all and every person or persons whomsoever, who are or shall be possessed of or interested in any such lands, tenements, hereditaments, or premises, or who shall sustain any damage, to give their consent in writing to the said trustees, for the taking or pulling down of such dwelling-house or other building, or the making such deviation of more than 100 yards as aforesaid, or the making use of such garden, yard, paddock, park, planted walk, avenue, or other such premises as aforesaid, and to contract with the said trustees for the sale thereof, or for the satisfaction to be made for the same, or for such damages as aforesaid, and by conveyance, lease and release, or bargain and sale, to sell and convey unto the said trustees all or any such lands, tenements, hereditaments, or premises, or any part thereof, for the purposes aforesaid; And all contracts, sales, and conveyances which shall be so made, shall be good, valid, and effectual, to all intents and purposes, without fine or recovery, and shall be a complete bar to all estates tail and other estates, rights, titles, trusts, and interests whatsoever, any law, statute, usage, custom, or other matter to the contrary notwithstanding; and all such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees, committees, executors, administrators, and all other persons, shall be and are hereby indemnified for what they or any of them shall do by

virtue or in pursuance of this Act:—Provided always, that nothing herein contained shall extend, or be deemed, taken, or construed to extend to revoke, limit, abridge, or alter, or vary any powers or authorities contained in any Act or Acts of Parliament existing and in force at the passing of this Act, for making, altering, or diverting any turnpike road or roads, or the course thereof, to be made, altered, or diverted and maintained under the authority of such Acts, but the same powers and authorities shall and may be exercised and carried into effect by the trustees appointed by such Acts, fully and effectually; any thing herein contained to the contrary notwithstanding.

Regulations for the payment of compensation-money, when the party entitled thereto shall be under any incapacity.—By Stat. 7 & 8 Geo. 4. c. 24. s. 9, It is enacted, That if any money shall be agreed or awarded to be paid for any lands, tenements, or hereditaments, purchased, taken, or used by the trustees, which shall belong to any body politic, corporate, or collegiate, corporation aggregate or sole, infant, lunatic, tenant for life or in tail, general or special, feoffee in trust, guardian, committee, trustee, feme-covert, or other incapacitated person, such monies shall, if the same amount to the sum of £200, with all convenient speed, be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account *ex parte* the trustees for executing such Act, pursuant to the method prescribed by an Act passed in the first year of the reign of King George the Fourth, intituled, *An Act for the better securing the Monies and Effects paid into the Court of Exchequer at Westminster on Account of the Suitors of the said Court, and for the Appointment of an Accountant-General and two Masters of the said*

Court, and for other Purposes, and the General Orders of the said Court, and without fee or reward;—And such money, when so paid in, shall be applied, under the direction and with the approbation of the said Court, to be signified by an order to be made upon a petition to be preferred in a summary way by the person who would have been entitled to the rents and profits of the said lands, tenements, or hereditaments, in the purchase of the land tax, or the discharge of any debt or debts, or such other incumbrances, or part thereof, as the said Court shall authorize to be paid, affecting the same lands, tenements, or hereditaments, or affecting other lands, tenements, or hereditaments, standing settled therewith to the same or the like uses, intents, or purposes; Or where such money shall not be so applied, then the same shall be laid out and invested, under the direction and approbation of the said Court, in the purchase of other lands, tenements, or hereditaments, which shall be conveyed and settled to, for, and upon such and the like uses, trusts, intents and purposes, and in the same manner as the lands, tenements, or hereditaments which shall be so purchased, taken, or used as aforesaid, stood settled or limited, or such of them as, at the time of making such conveyance and settlement, shall be existing, undetermined, and capable of taking effect; And in the mean time, and until such purchase shall be made, the said money shall, by order of the said Court, upon application thereto, be invested by the said Accountant-General, in his name, in the purchase of *£3 per centum* Consolidated, or *£3 per centum* Reduced Bank Annuities; and in the mean time, and until the said Bank Annuities shall be ordered by the said Court to be sold for the purposes aforesaid, the dividends and annual produce of the said Consolidated or Reduced Bank Annuities shall from time to time be paid,

by order of the said Court, to the person who would for the time being have been entitled to the rents and profits of the said lands, tenements, or hereditaments so purchased, in case such purchase or settlement were made.

By *Section 10*, It is provided, That if any money so agreed or awarded to be paid for any lands, tenements, or hereditaments, purchased, taken, or used, and belonging to any person under any disability or incapacity as aforesaid, shall be less than the sum of £200, and shall exceed the sum of £20, then and in all such cases the same shall, at the option of the person for the time being entitled to the rents and profits of the lands, tenements, and hereditaments so purchased, taken, or used, or of his guardian or guardians, committee or committees, in case of infancy, idiotcy, or lunacy, to be signified in writing under their respective hands, be paid into the Bank of England, in the name and with the privity of the said Accountant-General of the Court of Exchequer, and be placed to his account as aforesaid, in order to be applied in manner hereinbefore directed; or otherwise the same shall be paid, at the like option, to two trustees, to be nominated by the person or persons making such option, and approved of by the trustees taking such lands, tenements, or hereditaments, (such nomination and approbation to be signified in writing under the hands of the nominating and approving parties,) in order that such principal money, and the dividends and interest arising thereon, may be applied in manner hereinbefore directed, so far as the case may be applicable, without obtaining, or being required to obtain, the direction or approbation of the said Court of Exchequer.

By *Section 11*, It is further provided, That where such money so agreed or awarded to be paid as hereinbefore

mentioned shall be less than the sum of £20, then and in all such cases the same shall be applied to the use of the corporation or person who would for the time being have been entitled to the rents and profits of the lands, tenements, or hereditaments so purchased, taken, or used, in such manner as the trustees taking such lands, tenements, or hereditaments shall think fit; or in case of infancy, idiotcy, or lunacy, then to his guardian or guardians, committee or committees, to and for the use and benefit of such person so entitled respectively.

Payment of money, where title not satisfactory, or owner not known, &c.—By Section 12, It is enacted, That in case the corporation or person to whom any sum or sums of money shall be awarded, for the purchase of any lands, tenements, or hereditaments, shall refuse to accept the same, or shall not be able to make a good title to the premises to the satisfaction of the trustees, or in case the person to whom such sum or sums of money shall be so awarded cannot be found, or if the person entitled to such lands, tenements, or hereditaments, be not known or discovered, then and in every such case it shall be lawful for the said trustees to order the said sum or sums of money to be paid into the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Exchequer, to be placed to his account, to the credit of the parties interested in the said lands, tenements, or hereditaments, (describing them,) subject to the order, controul, and disposition of the said Court of Exchequer; which said Court, on the application of any person making claim to such sum or sums of money, or any part thereof, by motion or petition, shall and is hereby empowered, in a summary way of proceeding or otherwise, as to the same Court shall seem meet, to order

the same to be laid out and invested in the Public Funds, and to order distribution thereof, or payment of the dividends thereof, according to the respective estate or estates, title, or interest of the person making claim thereto, and to make such other order in the premises as to the said Court shall seem just and reasonable; and the cashier or cashiers of the Bank of England, who shall receive such sum or sums of money, is and are hereby required to give a receipt or receipts for such sum or sums of money (mentioning and specifying for what and for whose use the same is or are received) to such person as shall pay any sum or sums of money into the Bank as aforesaid.

Persons in possession, presumptively entitled. — By Section 13, It is provided, That where any question shall arise touching the title of any corporation or person to any money to be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, in pursuance of this Act, for the purchase of any lands, tenements, or hereditaments, or of any estate, right, or interest in any lands, tenements, or hereditaments, or of any Bank Annuities to be purchased with any such money, or to the dividends or interest of any such Bank Annuities, the person who shall have been in possession of such lands, tenements, or hereditaments at the time of such purchase, and all persons claiming under such person or under the possession of such person, shall be deemed and taken to be lawfully entitled to such lands, tenements, or hereditaments, according to such possession, until the contrary shall be shown to the satisfaction of the said Court of Exchequer; And the dividends or interest of the Bank Annuities to be purchased with such money, and also the capital of such Bank Annuities, shall be paid, applied, and dis-

posed of accordingly, unless it shall be made appear to the said Court that such possession was a wrongful possession, and that some other person was lawfully entitled to such lands, tenements, or hereditaments, or to some estate or interest therein.

The Court may order expences and costs to be paid by trustees of the road.—By Section 14, Where, by reason of any disability or incapacity of the corporation or person entitled to any lands, tenements, or hereditaments, the purchase-money for the same shall be required to be paid into the said Court, and to be applied in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses, it shall be lawful for the said Court to order the expences of all purchases from time to time to be made in pursuance of this Act, or so much of such expences as the said Court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the trustees taking any such lands, tenements, or hereditaments, who shall from time to time pay such sums of money for such purposes as the said Court shall direct.

Trustees to fence new roads.—By Stat. 4 Geo. 4. c. 95, s. 66, In all cases where the trustees of any turnpike road shall turn or alter any part or parts of such turnpike road, or make any new road over and through any private grounds, or across any public or private footway, or shall take away any fence, for widening or improving any such road, the said trustees shall make, or cause to be made and planted proper quickset hedges, or shall make or build proper fences or walls, on both sides of such new-made road, or on the side upon which any such fence may be so removed as aforesaid, with sufficient ditches

to the same, and sufficient posts and rails, or other fences; on both sides of such quickset hedges, to protect the growth thereof, so as effectually to guard and fence off the lands adjoining any such road from trespass or injury by horses, asses, cattle, sheep, or swine; and also proper gates, stiles, posts, bridges, and arches, where necessary, out of any such road into the lands adjoining, and shall keep such fences so to be made in good order and repair, for and during the term of five years from the time that such fences shall have been made or set up; unless the owners or proprietors for the time being of any such land or ground shall agree with the trustees to keep such fences in repair from an earlier period, for such time as aforesaid.

In the case of *Rex v. The Commissioners of the Llandilo Roads* (a), it appeared that in the year 1765, an ancient road leading through the town of Llandilofour, which went along the outside of the church-yard, was by an order of the trustees carried through the middle of the church-yard; at which time the trustees caused a wall to be built at their sole expence on each side of the road so diverted, which they had ever since repaired till within the last three years. By a clause in the Act it is enacted, "That the trustees shall apply the money raised by the tolls, &c. in erecting gates and toll-houses, and repairing and widening the said roads within their respective districts, and defraying the necessary costs, charges, and expences attending the same and the execution of the said Act." It was contended, that under this clause the trustees were liable to the repair of the wall which they had built, upon the plea that these walls should be considered as part of the road for this purpose, because

(a) 2 T. R. 232.

the road could not have been turned through the church-yard without erecting them. *Sed per* Ashhurst, J. "As no clause is inserted in the Act which throws the *onus* of repairs on the trustees, we cannot make them liable." And *per* Buller, J. "What is meant by the road in the Act is the surface over which the subjects have a right to pass."

Persons liable by tenure, &c. to repair old road, shall, in proportion, remain liable to new road.—By Statute 4 Geo. 4. c. 95. s. 68, After reciting, That doubts have arisen and may arise, whether any body politic or corporate, or any particular person or persons, liable to repair, by tenure or otherwise, any old turnpike road, or part of such road widened, altered, diverted, or turned, ought to repair or contribute to the repair of the whole or any part or proportion of the new road set out in lieu of the old turnpike road; for obviating such doubts, and preventing disputes about the same, It is enacted, That all and every body politic or corporate, and person and persons, who, was, were, or shall be, liable as aforesaid to the repair of any old turnpike road, which has been, since the passing of the said recited Act (a), or shall be, widened, altered, diverted, or turned, shall respectively be and continue in the same manner liable to the repair of such new road, set out in lieu of the old road, or so much thereof as shall be equal to the burthen and expence of repairing such old road, from which he, she, or they shall be exonerated by the widening, altering, diverting, or turning thereof:—And if the several parties interested therein cannot agree, the same shall be viewed by two justices of the peace of the county where such road shall be, and shall be settled, adjusted, and determined by them, in

(a) 3 Geo. 4. c. 126.

such manner as they shall think just and reasonable; and from and after such determination of the justices, the body politic or corporate, and person or persons liable to repair such new road as aforesaid, shall bear all charges of presentments, indictments, and prosecutions for not repairing the same; and if it shall be found more convenient to fix a gross sum, or an annual sum to be paid by any such body politic or corporate, or person or persons, instead of fixing the part or proportion of such new road to be repaired by him, her, or them, the said justices may, with the consent of such person or persons, and also of the trustees of the said road, obtained at a meeting of such trustees, order and direct the same accordingly; and the order and direction of the said justices shall be final and conclusive, and shall continue binding on all bodies politic or corporate, and persons whomsoever (a).

(a) See 4 Geo. 4. c. 95. s. 78, (ante, p. 205) whereby the trustees are authorized to contract

and agree with any person, for the making, amending, altering, or maintaining the road.



CHAPTER VI.

AS TO NUISANCES IN HIGHWAYS;—THEIR REMOVAL;— AND THE PUNISHMENT OF THE OFFENDERS.

I SHALL, in this Chapter, pursue the same arrangement, which has been already adopted with regard to other parts of our subject, and consider the law relating to nuisances in highways: 1st, As it exists under the common law :— 2dly, As it is regulated by the Highway Acts:—and 3dly, As it is regulated by the Turnpike Acts.

SECTION I.

As to nuisances at the common law.

Both this and the two following Sections will require to be subdivided into two parts: 1st, As to the nature of the nuisances: and 2dly, How the nuisances are to be removed, and the offenders proceeded against.

FIRST: *What is considered by the common law to be a nuisance in a highway.*

A public nuisance may be defined to be an offence against the public, either by doing a thing, which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. On the other hand, annoyances to the interest of particular persons are not punishable by a public prosecution as common nuisances, but are left to be redressed by the private

actions of the parties aggrieved by them (*a*). And from hence it clearly follows, that no indictment for a nuisance can be good, which lays it to the damage of private persons only (*b*).

In conformity with the above principle, the neglect to repair a highway, by the party who is bound to make such repair, is by law considered to be the subject of a public prosecution as a nuisance, equally with any actual obstruction to the public right of passage.

It seems to be clear, that all injuries whatsoever to any highway, as by digging a ditch (*c*), or making a fence across it, or laying logs of timber along it, or by doing any other act which will render it less commodious to the king's people, are public nuisances at common law (*d*).

And there is no doubt, that it is a nuisance at common law to erect a new gate in a highway (*e*). Although it may, perhaps, be argued that a gate erected in a highway will be no nuisance, because, if it were, it could not be justified by any prescription, as it is agreed that it may be; but to this it may be answered, that the erecting such a gate is a nuisance, because it interrupts the people in that free and open passage, which they before enjoyed and were fully entitled to; whereas, when such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which

(*a*) 2 Rol. Ab. 83.—1 Hawk. P.

C. c. 75. s. 1. and 2.

(*b*) 1 Sid. 209.—1 Hawk. P. C.

c. 75. s. 3.

(*c*) Rex v. The Inhabitants of

Shelderton, 2 Keb. 221, pl. 68.

(*d*) Kitch. 34, 35.—1 Hawk. P.

C. c. 76. s. 144.

(*e*) 1 Hawk. P. C. c. 76. s. 146.

case the people had never any greater freedom of passage than what they still enjoy (*a*).

Also it seemeth clear, that it is a nuisance to suffer the ditches adjoining to a highway to be foul, by reason whereof it is impaired; or to suffer the boughs of trees growing near the highway to hang over the road, in such a manner as thereby to incommode the passage (*b*).

A party obstructing a highway cannot plead that the hindrance is only partial, and that the public have sufficient room left to pass along the way, if they have not the same free and full passage as they are entitled to. Therefore it is no excuse for one who layeth logs of timber along a highway, that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs (*c*). Yet it is said to be no nuisance, for the inhabitants of a town to unlade billets, &c. in the street before their houses, by reason of the necessity of the case, unless they suffer them to continue there an unreasonable time after they are unloaded (*d*).

But if the obstruction in such a case be continued beyond a reasonable time, the party committing it will be liable to an indictment. Thus in the case of *Rex v. Russell* (*e*), a waggoner was convicted of a nuisance, for occupying one side of a public street in a city, before his warehouses, in loading and unloading his waggons for several hours at a time, both by night and by day, and

(*a*) See 1 Hawk. P. C. c. 75, s. 9, and the cases there cited.

(*b*) 1 Hawk. P. C. c. 76, s. 147.

And see *Stephens v. Hayns*, Raym. 250.

(*c*) 3 Rol. Ab. 157, B.—1 Hawk. P. C. c. 76, s. 145.

(*d*) Ibid.

(*e*) 6 East, 427.—And see *Bush v. Steinman*, 1 Bos. & Pul. 404.

having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, although there was room for two carriages to pass on the opposite side of the street. *Per Cur.* The primary object of the street was for the free passage of the public, and any thing which impeded that free passage, *without necessity*, was a nuisance.

And in the case of *Rex v. Cross (a)*, the defendant was indicted and found guilty for keeping coaches at a stand in the street, waiting for passengers. *Per Lord Ellenborough, C. J.* "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is an indictable offence. It is immaterial how long the practice may have prevailed, *for no length of time will legitimate a nuisance.*"

In accordance with what is here laid down by Lord Ellenborough, it may be concluded, that, as the obstructing a highway, by diverting it or attempting to stop it up, is clearly a nuisance at the common law, it is immaterial how long a highway has been shut up, and disused by the public; and that the people can never be barred of their right, unless the inclosure of the way has been made either by licence obtained upon a writ of *ad quod damnum*, or by means of the legislative provisions which have been detailed in the preceding Chapter (*b*). And therefore, if a highway has been changed and diverted without the formalities required by law, and notwithstanding the public may for a length of time have made use of the substituted way, yet they may, at their pleasure, return to

(a) 3 Campb. 226.—See Stat. 13 G. 3. c. 78. s. 11. Post, Section II.

(b) See *Rex v. Ward*, Cro. Car. 266, pl. 16.—And *Voight v. Winch*, 2 B. & A. 662. S. P.

the old path, and remove any obstruction there, or indict the person who has caused or continued such obstruction. And for the same reason, under similar circumstances, the proprietor is at liberty at any time to warn the people from passing over the substituted way; and *after notice* (for without such notice a plea of licence would be permitted (a),) he may sustain an action of trespass against any person who shall traverse the new way: unless the occupation thereof by the public, and other circumstances, are sufficient to support the inference of a dedication by the owner (b).

It may also be stated as clearly deducible from Lord Ellenborough's decision in the above case of *Rex v. Cross*, that it is a common nuisance to plough up a public foot-path; not only because the public are obstructed in their accustomed passage, but more particularly as all traces of the way are thereby obliterated, and the public are left in ignorance as to the route which they ought to pursue. This is a point of law seldom attended to, and yet very frequently violated: but there can be no doubt, that any *occupant*, who thus infringes upon the public rights, subjects himself to an indictment. In one case (c) where an information was laid against the defendant for stopping of the highway, the word was *obstupabat*; it was proved in evidence that he *plowed it up*, and the Court resolved that it did well maintain the information.

It seemeth, says Mr. Hawkins (d), that an heir may be indicted for continuing an encroachment or other nuisance

(a) See Cro. Car. 267.—Yelv. 141, 142.

(b) As to the doctrine of dedication, see ante, Chapter III.

(c) Griesley's case, 1 Ventr. 4. And see 6 Mod. 145.

(d) 1 Hawk. P. C. c. 76. s. 157.

to a highway, begun by his ancestor, because such a continuance thereof amounts in the judgment of law to a new nuisance.

Yet in *Austin's Case* (a), in an indictment for erecting posts and rails in a highway, it was held necessary to prove that the party indicted *set them up*; for a continuance of them, or not suffering them to be removed, would not serve.

THE question as to what is to be considered a nuisance in a *public navigable river*, acquires, at the present period, a peculiar interest, from the circumstance of the dispute which is yet pending, as to an obstruction in the River Tyne, and the difference of opinion which has existed among the Judges of the Court of K. B. relative thereto. I hope therefore to be excused, if I venture to consider this subject somewhat at large.

I have already made some observations upon the quality of a public navigable river (b): and shewn that it is a highway, and that therefore it should be a thoroughfare. I may here add an expression of Lord Hale's, which seems to confirm this. He says (c), "These, whether they are fresh or salt, whether they flow or reflow or not, are *primâ facie publici juris*, common highways for man or goods or both, *from one inland town to another*." Here that great Judge evidently alludes to the rule of law that a common highway must lead from town to town, and applies the same rule to public rivers. It appears, however, that as all rivers, so far as the tide flows up them,

(a) 1 Ventr. 183.

(c) De Jure Maris. p. 9.

(b) Ante, p. 19, et seq.

are held to be arms of the sea (a), the public will, in every such case, have a right of passage, provided there be the above requisite.

With regard to the nature of the public right in a navigable river, Lord Hale says (b), that "as well fresh rivers as salt, may be under these two *servitudes*, or affected with them, viz. one of prerogative belonging to the king, and another of public interest or belonging to the people in general." And this public servitude is thus described (c), "There be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters." And "as the common highways on the land are for the common land passage, so these kind of rivers, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regię*, so these public rivers for public passage are called *fluvii regales* and *haut streames le Roy*; not in reference to the propriety of the river, but to the public use." And in conformity with the doctrine already stated with regard to highways (d), the owner of the soil cannot change the course of a navigable river without a licence upon writ of *ad quod damnum*; and if he render a stream navigable, by making locks or cutts, or drawing together other streams, yet this seems not to make it *publici juris* (or, a highway;) and he may pull down his erections, and restore the river to its old state, at his pleasure, unless by long continuance of time it hath been freely devoted to the public use (e). So if he purchaseth the King's Charter to take a reasonable toll for the passage of the

(a) De Jure Maris. p. 12.

(b) Ibid. p. 6.

(c) Ibid. p. 8.

(d) Ante, Chapter V.

(e) See ante, Chapter III, as to the dedication of a highway.

king's subjects, and puts it in ure, these seem to be devoting, and as it were consecrating of it to the common use (a).

So, *primâ facie*, the soil of all fresh rivers that are thus *publici juris*, belongs, *usque filum aquæ*, to the adjoining proprietors (b); and the soil of arms of the sea *primâ facie* belongeth to the king (c).

Having premised thus much as to the nature of the public right in a navigable river, I shall proceed to consider what are nuisances therein. Lord Hale, after stating the clause in *Magna Charta*, which directs the removal of nuisances, says, "These nuisances are such as hinder or obstruct the passage of boats; as wears, piles, choaking up the passage with filth, diverting of the river by cutts or trenches, decay of banks, or the like (d)."

So by *Magna Charta*, and other Statutes, wears that were prejudicial to the passage of vessels were to be pulled down (e). And although a subject may, by prescription, have a wear in the sea, yet, if it be a nuisance to the passage of ships, it may be abated (f).

After stating the right of piscary and other private interest, which a subject may, by charter from the king or by prescription, acquire in arms of the sea, Lord Hale observes (g), "Yet this interest or right in the subject must be so used, as it may not occasion a common annoy-

(a) De Jure Maris. p. 9.

(e) Ibid. p. 22.

(b) Ibid. p. 1.

(f) Ibid. p. 21.

(c) Ibid. Chapters iv. and v.

(g) Ibid. p. 22. And see p.

(d) Ibid. p. 9.

36.

since to passage of ships or boats; for that is prohibited by the common law and these several Statutes before mentioned, viz. erecting new wears, enhancing old, fixing of pikes or stakes, and the like, in order to fishing: for the *jus privatum*, that is acquired to the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use."

Mr. Hawkins says, "It seems certain, that it is a common nuisance to divert part of a public navigable river; whereby the current of it is weakened, and made unable to carry vessels of the same burthen as it could before (a)."

So it is a nuisance to lay timber in a public river, although the soil on which it is laid belong to the party, provided it obstructs the necessary intercourse (b).

In the late case of *Rex v. Lord Grosvenor and others* (c), the defendants were indicted for a nuisance in erecting a wharf on the River Thames to the injury of the navigation of the river. It appeared on the trial, that the Corporation of London, who were conservators of the river, were the proprietors of the soil, and that they had let a space of ground to Lord Grosvenor for the purpose of erecting a wharf there, in consideration of a fine and a small annual rent. The wharf in question had been erected between high and low water-mark, and extended for a considerable space along the river. There had formerly been a recess there between two projections,

(a) 1 Hawk. P. C. c. 75. s. 11, and see s. 5.

(b) 3 Bac. Abr. 686. And see 3 Keb. 759, pl. 43.

(c) 2 Stark. N. P. R. 511.

which afforded a place of refuge in time of storm, and was a great convenience to watermen. On the part of the defendants it was contended, that, as claiming under the Corporation of London, they had a right to make such an erection between high and low water-mark; and that by *Stat. 14 Geo. 3*, they were entitled to build wharfs and let them, provided this did not interfere with the navigation of the river. *Sed per Abbott, C. J.* "Will you contend, that you have a right to narrow the River Thames, so long as you leave a space sufficient for the purposes of navigation? It is impossible that you should derive any protection from the Corporation of the City of London, as the conservators of the river."—It was then contended on the part of the defendants, and evidence was given tending to support that defence, that the erection of the wharf in question had been productive of advantage rather than of detriment to the navigation of the river. In his address to the jury, Lord C. J. Abbott observed, "The question here is, whether a public right has not been infringed. An embankment of considerable extent has been constructed for the purposes of building a wharf. Much evidence has been adduced on the part of the defendants for the purpose of shewing that the alteration affords greater facility and convenience for loading and unloading; but the question is not, whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the River Thames, has been affected or diminished by this alteration." And his Lordship added, "The public have a right to all the convenience, which the former state of the river afforded, unless by the change some greater degree of convenience is rendered." And the defendants were found Guilty.

In the case of *Rex v. Russell*, which I shall next refer to, this last observation of the learned Judge, was construed by the counsel for the defendant in a sense which cannot fairly be attributed to it. It was urged as supporting the doctrine, that any convenience resulting from the obstruction, although not to the navigation of the river but quite collateral to and disconnected with the public right, would warrant an infringement of that public right. But plain reason and the context clearly shew, that the greater degree of convenience to be rendered, must be of the same quality as the minor degree of which the public may be deprived, so that the general right shall not be diminished.

I come now to the case of *Rex v. Russell and others* (a); the one to which I have before alluded, as relating to an obstruction in the River Tyne, and upon which a difference of opinion has prevailed.

An indictment was preferred against the defendants for a nuisance in the River Tyne. At the trial at the Yorkshire Summer Assizes, 1824, the facts of the case were proved to be as follows: The defendants were the owners and occupiers of a coal-mine at Wallsend, on the north side of the River Tyne. For the purpose of shipping their coals, they had caused to be erected two staiths. These erections consist of piles, (technically called gears) driven into the bed of the river, on the top of which a platform and railway are laid; the coal-waggons pass along this railway, and at the end are lowered, by means of a machine called a drop, into the hold of the vessel. The coals are there deposited, and the waggon raised up again

(a) 6 B. & C. 566.

by the machine, and placed on the railway. One of these staiths extended nearly 150 feet, and the other 130 feet from high water-mark into the river, and each of them extended a few feet beyond low water-mark. The drops, when let down, extended 40 feet further, and ships when taking in their cargo were obliged to lie at that distance from the staiths, but the drops when drawn up did not occasion any obstruction to the navigation. When ships are not laden at staiths, the coals are first taken on board of small craft, called keels, and cast by hand from the keels into the ships. When ships are laden in this manner, they generally have a keel lying on each side, and thus occupy a greater space in the river than when laden by means of the staiths and drops (*a*), and their cargoes cannot be put on board in less than double the time. The expence of shipping coals in this manner is greater, and the coals are in worse condition than when shipped by means of the staiths (*b*). It was proved that the staiths indicted, occasion, at particular times of tide, a considerable obstruction to small craft navigating against the stream, and for some time before and after high water occupy a considerable space which would otherwise be navigable by large vessels; but if there were no staiths, the number of keels used on the Tyne would be greatly increased, and the river would be very much crowded with them. There was a sand-bank at the south side of the river opposite one of the staiths in question, and it

(*a*) Is it meant to be asserted, that the vessel and the two keels occupy a greater space in the river than the vessel, together with the staith, &c.? for if not, the fact is nothing worth, as every one must comprehend, that a vessel

with two keels is larger than the vessel alone.

(*b*) This evidence is quite unconnected with the question as to the navigation, and appears to be irrelevant and inadmissible see post, p. 455, 6.

was proved to have increased after that erection was made, in consequence of the change thereby produced in the current of the water. The Corporation of Newcastle are conservators of the River Tyne and port of Newcastle (which extends further up the river than the place where the staiths were erected,) and gave the defendants leave to erect the staiths. When the learned Judge, who presided at the trial, (Mr. Justice Bayley) began his summing up, it was agreed, that, if the defendants were acquitted, the prosecutors might, on the ground of any supposed mis-direction, move to enter a verdict for the Crown, or for a new trial. He then proceeded to state his opinion, that the use of a navigable river was not for passage only, but for other important rights which might supersede the right of passage. That when a great public benefit accrued from that which occasioned the abridgment of the right of passage, that abridgment was not a nuisance, but proper and beneficial; and he directed the jury to acquit the defendants if they thought that the abridgment of the right of passage in this case was for a public purpose, and produced a public benefit, and if it was in a reasonable situation, and a reasonable space was left for the passage of vessels navigating the River Tyne; but otherwise to find a verdict for the Crown. He then pointed out to them that the staiths were not merely a private benefit, for that by means of them the coals were brought to market at a smaller expence, and in a better condition, in both which respects the public were benefitted (a); and he then left to their decision the following questions: Were the staiths erected in a reason-

(a) This public benefit was not proved in evidence, it is only an inference from the fact, that they

were shipped at a less cost and in a shorter time than by means of keels.

able place? Was there a reasonable space left for the public navigation in the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals?—The jury said, that, in consequence of this direction, they found the defendants, Not Guilty. A motion was afterwards made in the Court of K. B. for entering a verdict of Guilty, or for a new trial, but was refused, upon the judgment of Bayley, J. and Holroyd, J. in opposition to the opinion of Lord Tenterden, C. J.

I trust I shall not be deemed presumptuous, if I offer some argument to shew that the law, as delivered by Mr. Justice Bayley in his address to the jury is at least doubtful, since its correctness is questioned by the great authority of Lord Tenterden. And in the first place, to clear the way, I shall observe, that the nuisance complained of is not erected within the *actual port* of Newcastle, but in the navigable River Tyne. If it be held allowable to place such an obstruction where this is erected, the only reasoning which can be adduced in favor of that position, will equally apply to a staith erected in any other navigable river, although that river may happen not to be situated within the jurisdiction of a port. The pleadings in this case expressly charge the nuisance complained of to be an obstruction to the ancient river and highway of the Tyne. And in confirmation of this, Lord Tenterden says (a), “ The erections in question are said to be in the port of Newcastle, by which I understand to be meant that they are within the limits of the jurisdiction of that port. They are certainly at a considerable distance below the public quays and places of general resort of vessels trading to that port, and must be passed

(a) 6 B. & C. 601.

by vessels resorting to and from such places." And here I think lurks one great cause of the difficulty which exists in this case. The chief authority which was relied upon on the part of the defendant, and by the two Judges who supported his argument, was an expression from Lord Hale, when alluding to nuisances in a port. And as a nuisance may be defined to be any obstruction to a public right, the question of nuisance or no nuisance must depend upon the nature of that right which is alleged to have been obstructed; and that which would be considered as indictable in one case, might be warranted under other circumstances. The public right in a port differs essentially from their right in a navigable river. In the one the public have a right of passage, and a right of passage only, except liberty to use a reasonable space and time for the purpose of loading and unloading; while in the other there are rights not only of navigation, scil. *eundo et redeundo*, but *morando*, and that not only for the purpose of loading and unloading, but for other purposes of commerce. A port is a public place for the resort and stowage of vessels. It may be said to resemble a market. Thus there is a franchise to collect port-dues, as in a market there is a right to receive toll. Now there are many obstructions which are lawful to be made in a market, which would be indictable if committed on a highway. A street is very frequently the place for holding a market: yet no one would venture to assert, that if the market were not to be held there, the same hindrance to the passage would be permitted, or that the stalls and carts would be suffered to remain there, which almost block up the way during the market-time. And in like manner many erections may be made in a port, which would be abateable as nuisances if found in a public river. It seems then very doubtful whether the authority cited from Lord Hale be at all applicable to the present case.

As a navigable river differs in its nature from a port, and as the quality of any obstruction, whether nuisance or not, depends upon the extent of the public right supposed to have been infringed upon, we must bear strictly in mind what are the public rights in this case. A navigable river, it cannot be denied, is a highway, to be used indeed in a particular manner. It is for the passage of vessels: but as these carriages cannot be removed from the way itself, the public have a right to load and unload while standing in the water, provided they occupy only a reasonable space and that only for a reasonable length of time. Such a privilege of loading or unloading, or making a temporary obstruction, if for advantage in the use of the right of passage, is recognized even with regard to highways in general; though there perhaps to a more limited degree. Thus we have seen, that a liberty to unlade billets in a street, occupying only a reasonable time, was considered not to be a nuisance (*a*). And see the case of *Rea v. Russell* (*b*), where the Court said, "The primary object of the street was for the free passage of the public, and any thing which impeded that free passage *without necessity* is a nuisance."

It is not, at present, intended to argue the question, whether this obstruction in the River Tyne be or be not a nuisance. The determination of that point is the peculiar province of the jury. I am now endeavouring to ascertain, what are the principles upon which the case should be submitted to the decision of the jury. And I contend, that the jury have to decide, whether the obstruction be a nuisance to the *navigation* of the river, without reference to the benefit or injury to any other right whatever

(*a*) Ante, p. 441.

(*b*) 6 East, 427, and ante, p. 441.

than the right of way. If the passage for vessels be straitened, or the course of the river obstructed, farther than is requisite for the purposes of the navigation, including perhaps the loading and unloading as well as the actual sailing of vessels, then the erection will be a nuisance.

Let us consider the pleadings, and look at the terms of the issue which is put upon the record. For no argument is so correct, or ought to be so conclusive, as that which results from the forms of pleading. Here, the defendants are indicted for doing acts "by means whereof the navigation, course, stream, and passage of the river, &c. had been straitened, narrowed, lessened, obstructed, and blocked up." To this they plead *Not Guilty*: and thereby traverse the very terms of the allegation. It follows, that both parties are willing that the decision should rest upon the proof or failure to prove the charge contained in the indictment. And, unless the jury return a special verdict, they must directly either affirm or negative that charge. If the defence were, that the obstruction, as complained of, even if fully proved would not be indictable for a nuisance, it must be pleaded: but upon the above record the jury have no power to say that it is no nuisance to straiten, narrow, lessen, obstruct, and block up the navigation, course, stream, and passage of a navigable river.—If this reasoning be correct, we must next apply the principle of law, that the evidence is to be shaped by the issue, and that any proof, which goes to a point not contained in the issue, is irrelevant and inadmissible. In the present case, then, no evidence ought to have been received, which did not relate to the public right of navigation. If the defendant hoped to escape by means of other evidence, it is necessary for him first to

plead the facts, and so place his defence upon the record. Suppose his answer to the charge to have been that he admitted the erection, and that it straitened, lessened, &c. the river, *absque hoc* to the great damage and common nuisance, &c., for that the people inhabiting London and other places were thereby enabled to procure coals at a cheaper rate than they otherwise could do. Can any one for a moment suppose that the Court would entertain such a plea? And if not, can that be proved in evidence, which would never be allowed to appear upon the record? At any rate, in this case, the defendant has confined his traverse to the obstruction of the navigation. By that therefore he must stand or fall: nor can any evidence of utility, which is inapplicable to the very navigation itself, be admissible. The act complained of may profit all the nations of Europe, yet if it impede the navigation of a public river it is indictable. For the right of the public to passage is clear and according to law: but the benefit which may result from its obstruction is uncertain, unacknowledged by the law, and entirely a question of policy. To determine whether a public right shall be postponed to a public benefit is the province of the Legislature; and cannot be decided upon by Courts of Justice, whose duty it is to guard, not to overthrow established rights. This reasoning appears to form the technical ground for Mr. Brougham's argument, where he says, "The notion of justifying the obstruction of a public right, by shewing that a collateral benefit results from it, is perfectly novel."

If we apply the principle, which I have endeavoured to establish, to the circumstances of the case now under review, we shall find that the following points would arise out of the pleadings, as to which proof would have to be given to the jury: 1st, What is the public right in

the River Tyne? 2dly, What is the nature of the alleged obstruction? 3dly, Is that obstruction a nuisance to that public right? To the solution of these questions alone ought the evidence to be directed. The right is local: it is well established, and for its protection the process by indictment has been invented. It would be a perversion of justice for the Courts to commute a public right of one kind, and attached to one spot, for a public right or benefit of another kind, and operating upon a different part of the kingdom. The right of navigation in the River Tyne is alleged to be impeded; but it is not a whit the less impeded, if, in consequence of the obstruction, the inhabitants of London obtain their coals at an inferior price.

The reasons which are urged in favor of the law as delivered to the jury at York, scarcely support the conclusion which they are adduced to maintain.

Thus, Mr. Justice Holroyd, after having observed that there are various public and private rights in a river, says, "The enjoyment of each of those rights by some, is frequently and necessarily an obstruction to the free and complete enjoyment, either of the same or of some other of the above rights in others: but such obstruction is not necessarily a nuisance." This cannot but be admitted: but how does it apply to the case before us? Two vessels, it is clear, can never sail over the same spot at the same moment of time. Yet it is not because there are two conflicting, though permanent rights; but merely that there is a temporary obstruction of the same public right as to one person by the enjoyment of it as to another. There is no adverse possession; and it appears an absurdity to say, that the practical user of a

right can be a theoretical obstruction to its enjoyment. The instances alluded to by the learned Judge are themselves part of the public privilege which is alleged to have been invaded ; they are necessary to the exercise of that very privilege : and they are confined to the same locality. But a right at London can never be part of or necessary to a right at Newcastle. Nor can even a right connected with the town of Newcastle avail to supersede the right of navigation on the River Tyne.

I willingly submit to the observation of the same learned Judge, when he says, "Whether the obstructions are a nuisance or not is dependent upon circumstances ; and is, therefore, according to Lord Hale, a question of fact for the jury." But it does not appear a reasonable application of this principle to hold, that the question of a nuisance *to the navigation at Newcastle*, is to depend upon evidence *as to a benefit to the coal market in London*. The view most favorable to the defendants, in which, upon legal principles, this question could have been submitted to the jury, would be, Are the staiths beneficial to the loading of vessels, supposing that to be a part of the public right over the River Tyne ? But even for such a lawful purpose, this individual exercise of the public right must be with a due regard to its enjoyment by others, who are equally entitled to it ; as is most distinctly laid down by Lord Hale (a).

In his address to the jury, Mr. Justice Bayley commences with a definition of the public rights in a navigable river, which appears to be very comprehensive,

(a) See ante, p. 446.

when we compare it with what Lord Hale has laid down upon the subject. He says, "The use of a public water is not for passage only, but for many other purposes, and that many of those purposes are entitled to supersede the right of passage, and to narrow the rights of passage to those parts which may not be requisite for greater and more beneficial purposes. Where there is a space of water of very considerable extent, some part may be most usefully applied for the purposes of commerce, and that which is so applied may be over and above that which is sufficient for navigation; and where a great public benefit results from the abridgment of the exercise of the rights of passage, the great public benefit makes that abridgment no nuisance, but a useful, beneficial, and proper purpose."

It is difficult to reconcile what is here stated, as to the supersedeable nature of the public right of passage, with the opinion of Lord Hale. Throughout the whole of his Treatise *De Jure Maris*, that great Judge seems to express most strongly, that both by the common law and by statute, all other rights must yield to that of the public navigation. And wherever he treats of nuisances, he invariably describes them as being such from the obstruction caused to the passage. So predominant is this privilege of the people, that, "although a subject may, *by prescription* have a wear in the sea, yet, if it be a nuisance to the passage of ships, it may be abated (a)." If, then, admitted and established interests are to yield to the public right, surely an erection begun, continued, and ended without a shadow of legal title, *except inas-much as it can be shewn to benefit the public navigation*,

(a) *De Jure Maris*, p. 21.

cannot claim any larger protection than is allowed to the former. We have seen (a) how decidedly Lord Hale declares that the *jus privatum* must not prejudice the *jus publicum*, which he had described to be *the passage of ships and boats*: and the example of weirs, which is frequently given, approximates very nearly to the obstruction complained of in the River Tyne.

But it may be answered, that the present is a public right, and that one public right may supersede another. This argument, however, appears not to be well founded. The title of the public is merely to an easement over that which is the property of another. Lord Hale says, that public rivers are "common highways for man or goods, or both." The soil therefore belongs to the adjoining proprietors, except where the water is an arm of the sea, in which case it *primâ facie* belongs to the King; but never is it or can it be vested in the public. Now to establish a public right, there must either have been a prescriptive adverse possession, or there must be such a possession by the public as is accompanied with the actual or the implied consent of the owner. But there can be no usage or possession on the part of the public of a right to erect a staith upon a particular spot. To say otherwise, would be an obvious absurdity. A public right must always be such, as in its enjoyment by individuals is of a fleeting, temporary nature. It extends to *user* alone, and can never embrace proprietary dominion. Though now confined within narrower bounds, it is exactly similar in theory to the general nature of property in the first ages of the world, when every thing was possessed in common. Like that it may be said to consist of "en-

(a) Ante, p. 446.

joyment without property:" as when "no man seemed to have a right to dispose of what he laid his hands upon, only to make use of it; and therefore in this situation mankind had only *communis usus*; as in a play-house, no particular seat is properly your's, while you have a right to choose which you please, if you come in when the house is empty."

Any title, then, to build upon the soil which is subject to an easement in the public, must be a part of the private interest, and can never be licensed by the public right; and therefore, in the very words of Lord Hale, it may be abated if it be a nuisance to the passage of ships. And not merely is the power to cause these erections peculiar to and arising out of the individual right to the soil, but the erections themselves, when completed, are of such a nature that they can, under no circumstances, become public property. It follows, that to permit, as lawful, any such obstruction, is to allow the right of an individual to displace the right of the public.

It must be remembered, that there is a distinction between the right to make a staith and the right to use it. The public can never enjoy the former privilege; but when erected, they may acquire a right to load and unload at that staith, as they may become possessed of any other easement. But no such enjoyment by the public can legalize the nuisance caused by the erection itself. For if the obstruction be indictable at the moment of its erection, it is equally indictable, although the public may have made use of it after its completion; for the infringement to the original right is the same, and though the public can assent to the acquisition of rights by mere

possession, yet they can never relinquish or abridge rights which they have once obtained, except through their representatives in Parliament.

The authority mostly relied upon by the defendants is a passage from Lord Hale's Treatise *De Portibus Maris*; and all the cases cited, relate peculiarly to *Ports*. I have already endeavoured to shew, that as there is a distinction between the public right in a port or in a navigable river, there must be a corresponding variance between the definition of that which would be a nuisance in the one instance or in the other. But even independently of this argument, the passage from Lord Hale supports the principle according to which I am contending, that the question should be left for the decision of the jury. Amongst other instances of "such nuisances as are common to all men that have occasion to come, go, or stay at ports," the following is given (a): "The straitening of the port by building too far into the water, where ships or vessels might have formerly ridden; for it is to be observed, that nuisance or not nuisance in such case is a question of fact. *It is not therefore*" (this is the passage relied upon by the defendants) "*every building below the high water-mark, nor every building below the low water-mark, is ipso facto in law a nuisance.* For that would destroy all the keys that are in all the ports in England. For they are all built below the high water-mark. And it would be impossible for the King to licence the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, for the King cannot licence a common nuisance.

(a) *De Portibus Maris*, p. 85.

Nay, in many cases, it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the King's, the building below the high water-mark is a purpresture; but it is not *ipso facto* a common nuisance, *unless, indeed, it be a damage to the port and navigation.*" This last observation is the clue whereby to decypher the whole paragraph, and is almost *in ipsissimis verbis* the very principle I am asserting. Lord Hale says, that "Any building which is a damage *to the port and navigation*, is a nuisance." By the same reasoning, that erection in a river is a nuisance which is a damage to the navigation. Was the question so put to the jury at York? Certainly not. The question of damage was transferred from the navigation to the whole body of the people of England. And that which would have been excusable as being of benefit to the navigation, was considered in that light because it was of benefit to the public at large.

In the other instances adduced by Lord Hale, as examples of nuisances to a port, the very same reason is alleged for their being so considered. Thus he enumerates, silting or choaking up a port, either by the sinking of vessels or throwing filth into the port, whereby it is choaked; decays of the wharfs which are for the landing of merchandize and safe-guard of shipping (*a*); the leaving of anchors in the port without buoys or marks, whereby ships may strike against them and be spoiled; *and the building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed.*

(*a*) By giving this public character to the wharfs of a port, Lord Hale appears to confirm the

distinction between ports and navigable rivers.

The following observation of Lord Tenterden seems most clearly and most justly to disclose the law upon this subject. In the case which I have been commenting upon, his Lordship says (*a*), "Admitting that there is some public benefit, both from the price and condition of the coals, still I must own that I do not think those points could properly be taken into consideration in the question raised by this indictment. That question I take properly to have been, whether the navigation and passage of vessels on this public navigable river was injured by these erections."

Whether the alleged obstruction to the navigation of the River Tyne be really such, and therefore a nuisance, it is the peculiar province of the jury to determine (*b*). However, upon the statement of facts of which we are possessed, we may hazard the assertion, that if they do not disclose a nuisance, then the Treatise *De Jure Maris* may be said to contain no description of any nuisance, and the case of *Rex v. Lord Grosvenor* is an erroneous decision.

(*a*) 6 B. & C. 602.

(*b*) Another indictment was preferred for the same erections, at the last Assizes at Carlisle; and the jury returned as a verdict, "We find that part of the navigable channel of the Tyne, opposite Wallsend, has been narrowed, straitened, and obstructed; but that the trade of Newcastle has notwithstanding increased." Now as the trade of Newcastle

may owe its improvement to a hundred various sources, besides the staiths in question, this fact by no means proves any benefit peculiarly arising from the erection thereof. But even if such were clearly the case, yet upon the principle which I have been aiming to support in the text, this verdict is equivalent to that of Guilty.

If we admit the obstruction, then no plea of public benefit, however great, which does not apply to the right of navigation (and if it did, there could in such case be no obstruction) can be any defence to the indictment, for the following reasons:—

1st, Because if it be no nuisance in one case, it can be none in another; since if it be lawful for one person to cause such an erection, the same liberty must be granted to any other owner of the soil; and so on, until the river would be actually choaked up.

2dly. Or if this be denied, inasmuch as a reasonable space must be left for the navigation, then is the law both partial and unintelligible. For why is one man to receive any preference over his neighbour? Or how is it to be decided what is space sufficient for the public? The trade on the river may increase, and although what is now left free for navigation appears to be “a reasonable space,” it may, in future years, be inadequate to the traffic. It is scarcely for a Court of Justice to look into futurity, and by foretelling how much the public wants may hereafter require, to decide this question of right upon the plea of expediency or policy.

3dly. Suppose it were admitted that the obstruction is not to be considered a nuisance, as thereby the public derive an advantage in loading their vessels; this is still no excuse for the obstruction at such time as it is not in use for that purpose. Therefore it would follow, that one and the same obstruction is to be considered an indictable offence against the public interest at one period, and a benefit to that interest at another.

4thly. As was forcibly remarked by Mr. Brougham, *arguendo*, the existence of this public benefit is capricious and dependant upon the will of the owner of the staith; he may at any time cause the staith to be closed;

and it is even probable that in a few years it will become entirely useless, owing to the exhaustion of the coal-mines. In such events the obstruction must still be held *no nuisance*, or it must be abated. And those who declare it at present to be no nuisance, should shew how they will distinguish between the existence of the obstruction when in its harmless or its injurious state; with what evidence they will be satisfied; and what mode of remedy they will provide for its abatement, if it be proved to be obnoxious.

5thly. The question of benefit, which would thus be the point for the jury to decide, is one which the prosecutor can never prove by witnesses or the defendant disprove. The evidence would be endless and unsatisfactory. And why? Because its object would be to prove, not a fact, but an opinion. Nor could the defendant ever discover from the record what is the real point at issue, and how to shape his defence.

In the observations which I have thought it my duty to make upon the above case, let me not be understood as being opposed to public improvement. If these staiths do produce a general benefit (and I have never meant to deny that such may be the case), it is only required that they should be established by the authority and under the care of Parliament. By no other sanction can they be legalised. And it is right that it should be so; for no other jurisdiction can accompany a licence to make these erections with such provisions and regulations as are requisite to prevent too great an infringement upon the public interest. If by law one may be erected, by law there is no certain limit to the number; and when one is erected according to law, it can never by legal process be abated. But Parliament has power to provide for all such

events; and may declare how many shall be erected, how far they shall extend into the river, how they shall be used, and when and how they shall be removed, if their removal should ever be found necessary; and may impose all such other guards as shall be thought proper for the protection of the rights of navigation.

SECONDLY: How nuisances in highways are to be removed, and the offenders proceeded against.

It seemeth to be certain, that any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house, erected in a highway; for if one whose estate is or may be prejudiced by a private nuisance actually erected, as a house hanging over his grounds or stopping his lights, may justify entering into another's ground and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate; surely it cannot but follow *à fortiori* that any one may lawfully destroy a common nuisance. And as the law is now holden, it seems that in a plea justifying the removal of the nuisance, you need not shew that you did as little damage as might be; although such an averment is usually inserted in these pleas of justification (a).

But although any one may abate a common nuisance, obstructing a highway, and remove the materials, yet he cannot convert them to his own use (b).

(a) See 1 Hawk. P. C. c. 75. and the cases there cited.
s. 12, and 2 Roll. Abr. 144, 145, (b) 1 Hawk. P. C. c. 76. s. 157.

Yet in an indictment *for erecting posts and rails* in a highway, it was held necessary to prove that the party indicted set them up; for a continuance of them, or not suffering them to be removed, would not serve (*a*).

Wherever any lands are charged with the repair of a highway, if it be out of repair, the occupier, and not the owner of those lands, is the proper person against whom the indictment should be brought. For how are the public to know who is the owner of the lands charged with the repair? And it does not seem to be material what estate the occupier has in the lands liable (*b*). But if the owner suffer his lands to lie fresh, he will be subject to an indictment for the non-repair of the way (*c*).

It may be here stated, that disobedience to an order of justices, made under the Highway Acts, is an offence at common law, and punishable by indictment. Thus in the case of *Rex v. Balme* (*d*), the defendant was indicted for not obeying an order of two justices made pursuant to Stat. 13 Geo. 3. c. 78, relative to the widening a road, repairable *ratione tenuræ*. And *per* Lord Mansfield, C. J. "As to the mode of prosecution, disobeying an order of justices is a common law offence, and therefore punishable by indictment." And Aston, J. said, "The penalty given by the Statute is only *accumulative*." And he cited *Rex v. Robinson* (*e*).

(*a*) Austin's Case, 1 Vent. 183.

(*b*) Regina v. Watts, 1 Salk. 357.—Regina v. Bucknall, 7 Mod. 55, and ante, p. 104.

(*c*) Nottingham's Case, 2 Roll. Rep. 412, and Thomas Bole's case, Palm. 389.

(*d*) Cowp. 648.

(*e*) 2 Burr. 799. In this case it was held, that an indictment would lie for disobeying an order of the Sessions, though an Act of Parliament had given a particular remedy; the offence being punishable at common law.

All defects of the repairs of highways shall be presented in the county where they lie, and not elsewhere. And it is clear, that if a parish lies partly in one county and partly in another, and a highway situate in one division is in decay, an indictment against the inhabitants of that part of the parish only, stating that the inhabitants of that part of the parish ought to repair, is bad, and the indictment in such a case must be against the whole parish. This was decided in the case of *Rex v. The Inhabitants of Clifton* (a); though the contrary had been formerly held in the case of *Rex v. The Inhabitants of Weston-under-Penyard* (b).

A prosecution for *diverting* a highway is not good; because a highway cannot be diverted, but must always continue in the same place where it was, howsoever it be obstructed and a new way made in another place (c).

In the case of *Regina v. Watts* (d), an indictment was allowed, for not repairing a house standing upon the highway, ruinous, and like to fall down, which the defendant occupied, and ought to repair *ratione tenuræ suæ*.

Indictment against a parish for non-repair.—In every indictment against a parish for not repairing a highway, there are three essential averments, viz.

1st. It must be stated, *that the road is a highway*. And though it is often stated in indictments, or presentments for nuisances to highways, that “*from time whereof the memory of man is not to the contrary,*” or “*from*

(a) 5 T. R. 498.

(b) 4 Burr. 2507.

(c) *Agmondesham v. Cornwallis*, 1 And. 234.—Poph. 206.

(d) 1 Salk. 357.

time immemorial," there was and is a common and ancient king's highway, yet it is not necessary to do so; for it has been adjudged, that it is sufficient to state, both in indictments, and in pleas in trespass justifying under a right of way, in a compendious manner, *that it is a highway* (a). And where the indictment was of a nuisance to a *horse-way*, it was quashed, because it ought to be to the queen's or king's highway, or to the highway (b).

It does not seem to be at all necessary to state in the indictment or presentment, that the highway leads *from one place to another*, for the highways have no other bounds but the sea; therefore if the *terminus a quo* and the *terminus ad quem* are omitted, it appears that the indictment, or presentment, or a plea justifying a trespass because the place is a highway, is nevertheless good (c). Nevertheless if the party will state the *termini*, he is bound to prove them. And where, in an indictment against a parish for not repairing a highway, it was stated that "from time whereof, &c. there was and is a common and ancient king's highway leading *from* the parish of H. *towards and unto* the parish of G., &c. and that a certain part of the *same* king's common highway, *situate, lying, and being in the said parish of G.* containing in length," &c. was in decay; after verdict for the prosecutor, judgment was arrested, because it was not stated in the indictment that the highway out of repair lay in the parish of G.; for the word *unto* the parish of G. excludes that parish, according to 2 Roll. Abr. 81.

(a) *Aspidall v. Brown*, 3 T.R. 265, and 2 Wms. Saund. 158, n. 4.

(b) *Madox's case*, Cro. Eliz. 63.

(c) See *Halkey's Case*, Latch, 183.—*Rouse v. Bardin*, 1 H. Bla. 351, and 2 Wms. Saund. 158, n. 6.

pl. 19, where it is said, that "if A. be indicted for stopping a highway at D. leading *from D. to S.* it is not good, because it is not alleged, that the highway lies in D., for *from D.* excludes it;" and a parish is only bound to repair, if the highway indicted lies within it; and the Court held that this *was not aided by the subsequent allegation*, that a certain part of the same highway, situate in the parish of G. is in decay (a). This decision appears to have been acquiesced in, until the late case of *Rex v. Knight and others* (b), by which, although it is not expressly over-ruled, the principle involved in it is very much weakened. The indictment charged, that the defendants, with force and arms, wrongfully did stock up and remove, &c. the gravel, soil, and rubbish then being upon and over a certain brick culvert, for the convenience of his majesty's liege subjects, *passing therealong in the parish of S. &c. opposite to a certain mill there called S. Mill, in a certain king's common highway there, leading from S. to H.* And the Court held, upon motion in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of S. *Per Lord Tenterden, C. J.* "The indictment in *Rex v. Gamlingay* differed essentially from that in the present case. It stated that there was and yet is a common and ancient king's highway, leading from the parish of H. towards and unto the parish of G. Here the indictment charges, "that, &c. (as stated above). If we were to construe the words *to* and *from* as exclusive in this case, we should make the allegation inconsistent and insensible (c),

(a) *Rex v. The Inhabitants of Gamlingay*, 3 T. R. 513.

(b) 7 B. & C. 413.

(c) Was not this the effect produced in the case of *Rex v. Gam-*

lingay? The indictment would stand thus: "there is a highway *not in the parish of G.* and part of the *same* highway situate in the parish of G. is in decay."

which otherwise is perfectly consistent and sensible. In common parlance, the words *leading from a place* include as well as exclude that place; and at present my mind is not satisfied with the decision of the Court in the case of *Rex v. Gamlingay*, that the words *from* and *to* are necessarily exclusive." And Bayley, J. said, that in *Rex v. Gamlingay*, "the subsequent allegation, that a certain part of the same common highway situate in G. was in decay, did not go further, for it referred to the highway mentioned in the former allegation. Ld. Kenyon there lamented, that the Court was under the necessity of coming to the decision which they did in that case. Here we are relieved from that necessity, because in this case there is a distinct allegation, that the nuisance was committed in the parish of S. The words *leading from S. to H.* would *prima facie* import that it was a highway leading from a vill in the parish, and therefore must be considered as a highway leading from a vill or town situate in the parish to another place."

2dly. It must be stated in the indictment, *that the highway is out of repair*. Therefore where the way was averred to be *valde lutosa et tam angusta*, so that the queen's people cannot pass without danger of their lives, &c. the indictment was held naught for want of saying that the way was out of repair (a).

And it is said to be necessary to allege in the indictment or presentment to what part of the highway the nuisance complained of does extend, as by shewing how many feet in length, and how many feet in breadth, it contains. The reason assigned is, that, if it be not,

(a) Regina v. The Inhabitants of Stretford, 3 Lord Raym. 1169.

the defendant will not know the certainty of the charge against which he is to make his defence, nor will the Court be able to judge what will be the proper fine to assess (*a*). But as the Court does not at present estimate the fine from the description of the length and breadth of the road, as stated in the indictment, perhaps the want of stating it would not now be considered as a fatal objection. It has been held that an indictment for a nuisance, that a certain *highway and bridge* are in a ruinous condition, is not bad, for not setting out the length and breadth of the nuisance (*b*): nor for a nuisance in laying soil in a highway (*c*).

3dly. It must be stated in the indictment, *that the highway is situated in the parish*. The highway must be alleged in the presentment, or indictment, to lie in the parish indicted, otherwise it is not bound to repair it; and if it be not so alleged, the indictment, or presentment, is erroneous, and judgment will be reversed (*d*). And it seems, that if the highway be described as leading from one parish *unto* another, both parishes are excluded (*e*).

Indictment against individuals for non-repair.—It has been said, that barely to state that the defendant was bound to repair *ratione tenuræ*, without adding, *sue*, is insufficient: but it seems that it is not necessary (*f*).

(*a*) 1 Hawk. P. C. c. 76. s. 88. Cas. Temp. Hardw. 106, *per* Lee, C. J.—*Rex v. Hatfield*, *ibid.* 316, and *Rex v. Roberts*, 1 Show. 390.

(*b*) Say. 301.

(*c*) Say. 98.—See 2 Wms. Saund. 158 b. note 7.

(*d*) *Rex v. Hartford*, Cowp.

111, and *Rex v. The Inhabitants of Machynlleth and Pennegoes*, 2 B. & C. 166.

(*e*) See *Rex v. Gamlingay*, and *Rex v. Knight and others*, *ante*, page 472, 473.

(*f*) See 2 Wms. Saund. 158 c. note 9.

In many precedents of indictments or presentments against persons for not repairing a highway by reason of tenure, it is stated, that the party ought to repair by reason of his tenure, *as he and all those who held the said lands for the time being, from time whereof the memory of man is not to the contrary, were used to do*; but it does not appear to be necessary to insert these words; for the obligation upon him to repair seems to be sufficiently shewn, by averring that he ought to do so *by reason of the tenure of his lands*, without adding that those who held the lands for the time being have immemorially repaired. So in *Co. Ent.* 358 *a.* it is only stated, that the defendant ought to repair by reason of the tenure of his lands: and the very point seems to have been decided in *Keilw.* 52, *pl.* 4, in which it is said, that where a person is bound to repair a highway by reason of tenure, it is not necessary, either in an indictment or plea, to allege any title of *prescription*, because a prescription is *implied* in the estate of inheritance in the land (*a*); but where a person is bound to repair such a highway *by reason of inhabitancy*, a prescription must necessarily be alleged; and this difference was admitted to be a good one by the whole Court. And agreeable to the distinction taken in *Keilway* between an obligation to repair by reason of tenure and of inhabitancy, it has been holden, that an indictment against a *particular part* only of a parish, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that *the inhabitants* of the district from time immemorial *ought to repair and amend it*, is erroneous; it ought to have stated that the inhabitants of such district from time whereof, &c. *have used and been accustomed* and of right ought to

(*a*) And see 1 Chit. Plead. 204, that what the law presumes, need not be stated.

repair and amend it. For the inhabitants of a particular division of a parish are not bound to repair by common law, but their obligation must arise from custom or prescription; and therefore the indictment ought to shew the custom, prescription, or reason of their obligation (*a*).

As to the Plea.—If upon an indictment or presentment for not repairing a highway against the inhabitants of a parish at large, who are bound of common right to repair all the highways lying within it, the parish plead *Not Guilty*, they may shew that it is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of Not Guilty; and it is a well known rule of law, that whatever a plaintiff or prosecutor is bound to prove on the general issue pleaded to a declaration or indictment, the defendant may controvert the truth of by opposite evidence (*b*). And the old cases which say, that upon Not Guilty pleaded, the parish can only shew that the highway is in repair, must be understood as presuming that the way is first proved to be *the highway* as alleged in the indictment. But it is quite settled that the parish cannot throw the burthen upon particular persons upon the general issue, but they must set forth their discharge in a special plea (*c*).

But where a person is charged with the repair of a highway or bridge *against common right*, he may discharge himself upon Not Guilty pleaded to the indictment: and therefore where a particular division of a pa-

(*a*) 2 Wms. Saund. 158 c. note 9,
and the cases there cited.

Norwich, 1 Stra. 181, 182, 183.

(*b*) Rex v. The Inhabitants of

(*c*) Rex v. St. Andrews, 1 Mod.
112.—Anon. 1 Ventr. 256.

riah is charged with the repair by prescription, or a particular person by reason of tenure, or the like, which are obligations against the common law, they may throw the burthen either on the parish, or even on an individual on the general issue (a). And the reason seems to be, because upon this issue the prosecutor is bound to prove that the defendant is chargeable by tenure or prescription, and therefore the defendant may disprove it by opposite evidence. However, if they will, though unnecessarily, plead the special matter, it is held not to be enough to say that they ought not to repair, but they must go farther and shew *who ought* (b).

If a person indicted for not repairing *ratione tenuræ*, or a township, or other particular persons for not repairing by prescription, plead (though unnecessarily) to the indictment, and shew who ought to repair, as they must do, it is necessary to *traverse* their obligation to repair: but if a parish is indicted for not repairing a highway, or a county for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a traverse of matter of law, and such traverse, though very often inserted, is demurrable to, and therefore ought always to be omitted (c).

As to the evidence, &c.—The record of a prior conviction is generally conclusive evidence against a parish, whenever afterwards it may be indicted for not repairing the road for which that conviction was made. Therefore, where different districts or townships have immemorially repaired the respective highways lying within them, and

(a) 1 Stra. 180, 183, 184.

(c) 2 Wms. Saund. 159 a. n. 10,

(b) Rex v. Yarnton, 1 Sid. 140.

and see 1 Ibid. 23, note 5.

Rex v. Hornsey, Carth. 213.

a highway in one of these districts being out of repair the parish at large is indicted (as it may be), care must be taken that this prescription is pleaded to the indictment; for if judgment be given against the parish, whether after verdict upon *Not Guilty* or by default, the judgment will be conclusive evidence afterwards, that the whole parish is bound to repair, unless fraud can be shewn (a). But fraud is only put for an example; for if the other districts can shew they had no notice of the indictment, the defence having been made and conducted entirely by the district in which the highway indicted lay, without their knowledge or privity, the Court will consider it as being substantially an indictment against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish. And in such a case, if the *Fine* has been levied upon the inhabitants of the districts not liable to the repairs, the Court will grant a special *mandamus* for a rate on the districts bound to repair (b). But a record of *acquittal* is not considered evidence that the parish is *not* liable (c).

The inhabitants of the parish are not competent witnesses for the defendant (d). But, in the next Section, we shall see that the inhabitants are empowered by the Highway Act to give evidence in cases of nuisance, though their testimony cannot be received on the question of repair.

(a) *Rex v. The Inhabitants of St. Pancras*, Pea. N. P. C. 219.

(b) *Rex v. Townsend*, Doug. 421. And see *Rex v. Eardisland*, 2 Campb. 494, 8 P.

(c) *Rex v. The Inhabitants of St. Pancras*, Pea. N. P. C. 219.

(d) *Rex v. The Inhabitants of Shoreditch*, Mar. 26, 27, pl. 62.— See 1 B. & A. 66.

The *real* prosecutor may, however, be a witness, notwithstanding costs may be awarded against him if the prosecution prove vexatious (*a*).

As to the judgment.—The regular proceeding is to give judgment to abate the nuisance; but if it be not a permanent nuisance the Court will, in their discretion, impose a fine, such as will be effectual as an abatement (*b*).

Mr. Serjeant Hawkins says (*c*), there is no doubt but that whoever is convicted of any nuisance may be fined and imprisoned: And it is said, that one convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs.

In *Vin. Ab. Tit. Chimin Common, E. 27*, it is stated that the course of B. R. upon an indictment for stopping a way, is that the offender is admitted to a fine upon his submission *before verdict*, if there be a certificate that the way is repaired (*d*); but if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *constat* to issue out to the sheriff, who ought to return that the way is repaired; because the verdict, which is a record, ought to be answered with matter of record (*e*).

(*a*) *Rex v. The Inhabitants of Hammersmith*, 1 Stark. Rep. 337.

(*b*) See *Rex v. Pappineau*, 2 Stra. 686.

(*c*) 1 Hawk. P. C. c. 75. s. 14. and 15.

(*d*) A certificate of justices, certifying that a highway, which is the subject of an indictment, is

in a state of repair, is admitted in common practice as an adjudication of the state of repair, after a plea of Guilty pleaded by the parish. *Rex v. Mawbey*, Bart. and others, 6 T. R. 630. 635.—See Form, Appendix, No. LI.

(*e*) *Houghton's case*, Raym. 215.

In the case of *Regina v. The Inhabitants of Cluworth* (a), the defendants were indicted for not repairing a common footway, and confessed it and submitted to a Fine. And *per Cur.* The matter is not at an end by defendants' being fined, but writs of *distringas* shall be awarded *in infinitum*, till we are certified that the way is repaired.

But if the party indicted neglect to put the way into proper repair, after having been once fined, no second Fine can be imposed upon him under the same proceeding, but a fresh indictment must be brought (b).

To this effect is the case of *Rex v. The Inhabitants of Old Malton* (c), where the defendants had submitted to a fine, and Holroyd applied for a further fine, the whole fine being laid out on the way, and the way being still out of repair. Lawrence, J. doubted his power to give any further fine, on the ground that the Court had given their judgment; and though *Salk.* 358, states that the judgment is not at an end by the defendants coming in and submitting to a fine, and that if the road is not put in repair, writs of *distringas* shall issue against the defendants till the road is completed: he held, that those writs are now the only remedy on the present indictment; that the fine is the punishment for the neglect and offence of which the defendants are indicted; and though the Court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further

(a) *Salk.* 358, pl. 6. And see
6 Mod. 163, S. C.

Machynlleth and Penegoes, 4 B.
& A. 469.

(b) *Rex v. The Inhabitants of*

(c) *Yorkshire Summer Assizes*,
1794.—See 4 B. & A. 470, note.

punishment or fine; that the parish may be again indicted, and a fine imposed and apportioned (the road was a turnpike road) on such indictment.

In the case of *Rex v. Wingfield* (a), the defendant was indicted for not repairing a road, which he was bound to do *ratione tenuræ*. He had applied to the Court for leave to plead Guilty and submit to a small fine, on a certificate that the road was repaired. This being denied, he pleaded Not Guilty and the indictment went to trial, when defendant was convicted, it appearing that at the time of the presentment and subsequent application to the Court the road was out of repair, but was repaired before the trial. And it was moved that the defendant might submit to a small fine, without payment of the prosecutor's costs, on the authority of *The King v. Cheshunt*. But the Court, on the circumstances of the case, refused to set a small fine, unless the defendant paid the prosecutor's costs subsequent to the prior application. It was said, that the reason of not usually giving costs in these cases was because the Stat. Wm. 3d. directs the fine to go to the repair of the road: but the Court held, that this did not extend to repairs *ratione tenuræ*; the fine in this case being to be paid to the surveyor of the parish highways.

As to certiorari, &c.—In the next Section we shall see that the defendant is restricted in his power to remove the indictment by certiorari by Stat. 13 Geo. 3. c. 78. s. 24.

As a *new trial* is never awarded on a criminal proceeding after a verdict of Not Guilty, the same can never be granted on an indictment for not repairing or for obstructing a highway.

(a) 1 W. Black. 602.

This is decided by the case of *Rex v. The Inhabitants of Burbon* (a), where on an indictment for non-repair of a highway a new trial was moved for, upon the ground that the verdict was against all the evidence, and that the prosecution was for the purpose of trying a civil right only. *Sed per* Lord Ellenborough, C. J. "In general the rule is not to grant a new trial in a criminal proceeding after a verdict of Not Guilty. And inasmuch as the right will not be bound on the plea of Not Guilty, we do not think it would be proper to break into the general rule, on the suggestion that the prosecution was merely intended to determine a civil right."

But the Court has, under very particular circumstances, *suspended the entry of the judgment*, so as to enable the parties to have the question reconsidered upon a fresh indictment, without the prejudice of the former judgment (b). But with regard to so unusual a proceeding no certain rule can be laid down.

ANOTHER mode of proceeding is by *information*, which may be granted by the Court of King's Bench *at their discretion*. But they will never grant an information to compel a parish to repair a highway which is not much used; or when it appears, that another highway equally convenient to the public is in good repair. And, indeed, they never give leave to file an information for not repairing a highway, unless it appear that the grand jury have

(a) 5 M. & S. 392. And see *Rex v. Mann*, 4 M. & S. 337, and *Rex v. Cohen and Jacob*, 1 Stark. Rep. 516, S. P.

(b) *Rex v. The Inhabitants of Wandsworth*, 1 B. & A. 63. And see *Rex v. The Inhabitants of Middlesex*, *Ibid.* 64, note (d).

been guilty of gross misbehaviour in not finding a bill. And they refuse it for this reason, that the fine set, on conviction upon an information, cannot be expended in the repair of the highway, whereas on an indictment it is always so expended (*a*).

By a similar proceeding, if the circumstances of the case require it, the Court of King's Bench will interpose with their authority, and issue a *mandamus* to compel a party to re-instate in good order a way, for the nuisance to which he might also have been proceeded against by indictment. As, in *Rex v. The Severn and Wye Railway Company* (*b*), the Court issued their *mandamus* to compel the Company to re-instate and lay down again a portion of the tram-road, which they had illegally removed, as the remedy by indictment was not so effectual as that by *mandamus*: more especially as the defendants were a corporate body.

But in the case of *Rex v. The Justices of Dorset* (*c*), where the relators moved the Court to issue a *Writ of Prohibition*, to stay a nuisance which they complained of, in the demolition of a public county bridge, the motion was refused, as the application of a writ of prohibition to such a case would confessedly be new in modern practice, and there is a clear known remedy by indictment in the ordinary course, if the parties were pulling down the old bridge illegally; and the Court said, they did not feel themselves called upon to apply any new remedy.

(*a*) See *Rex v. The Inhabitants of Steyning*, Bay. 92. and Russell on Crimes, vol. i. p.

(*b*) 2 B. & A. 646. And see

Rex v. The Commissioners of Dean Inclosure, 2 M. & S. 80.

(*c*) 15 East, 594.

SECTION II.

As to nuisances and annoyances under the Highway Acts.

FIRST: *What nuisances and annoyances are prohibited by the Highway Acts.*

WE come now to the consideration of those acts which are proscribed by the Legislature, as being annoyances to the passengers along a highway, or detrimental to the condition of the way itself.

Encroachments upon a highway.—By Stat. 13 Geo. 3. c. 78. s. 63, If any person shall encroach by making, or causing to be made, any hedge, ditch, or other fences, on any highway, not being a turnpike road, within the distance of fifteen feet from the middle or centre thereof; or shall plough, harrow, or break up the soil of any land or ground, or in ploughing or harrowing the adjacent lands, shall turn his plough in or upon any land or ground within the distance of fifteen feet from the middle or centre of any highway, where the breadth of such highway is formed and marked or described with certainty, and does not exceed in breadth thirty feet; every person so offending shall forfeit, for every such offence, 40s. to such person who shall make information of the same:—And it shall be lawful for the surveyor, who hath the care of any such road, to cause such hedge, ditch, or fence to be taken down, or filled up, at the expence of the person or persons to whom the same shall belong:—And it shall be lawful for any one or more justice or justices of the peace for the limit where such offence shall be committed,

upon proof to him or them made upon oath, to levy as well the expences of taking down such hedges as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offender's goods and chattels, in such manner as distresses and sales for forfeitures are authorized and directed to be levied by virtue of this Act.

It is decided, that, under this clause the surveyor is not authorized to remove any fences, but such as are standing upon the highway, although the breadth of the road may be under thirty feet (a).

As to the number of draught-horses allowed to waggons and carts.—By Stat. 13 Geo. 3. c. 78. s. 55, It is enacted, That no waggon, having the sole or bottom of the fellies of the wheels of the breadth of nine inches, shall go or be drawn with more than eight horses; and that no cart, having the sole or bottom of the fellies of the wheels thereof of the breadth of nine inches, shall go or be drawn with more than five horses; and that no waggon, having the sole or bottom of the fellies of the wheels of the breadth of six inches, and rolling on each side a surface of nine inches, shall go or be drawn with more than seven horses; and that no such waggon, rolling a surface of six inches only, shall go or be drawn with more than six horses; and that no cart, having the sole or bottom of the fellies of the wheels of the breadth of six inches, shall go or be drawn with more than four horses; and that no waggon, having the sole or bottom of the fellies of the wheels of less breadth than six inches, shall go or

(a) See *Lowen v. Kaye*, 4 B. & C. 3: and ante, p. 173, where

it is alluded to, with reference to the 6th Section of the Act.

be drawn with more than five horses; and that no cart, having the sole or bottom of the fellies of the wheels of less breadth than six inches, shall go or be drawn with more than three horses, upon such highways, under the pains, penalties, and forfeitures hereinafter mentioned; (that is to say) That the owner of such waggon or cart respectively, shall forfeit the sum of £5, and the driver, not being the owner, the sum of 10s. for every horse or beast which shall be so drawing above the number hereby so respectively limited as aforesaid, to the sole use and benefit of the informer:—But carriages moving upon wheels, or rollers, of the breadth of sixteen inches on each side thereof, with flat surfaces, are hereby allowed to be drawn with any number of horses or other cattle.

But by *Section 56*, It is provided, that no prosecution shall be commenced before a justice of peace, by way of *information*, for any forfeiture incurred by the owner or driver of any carriage having a greater number of horses therein than are allowed by this Act, unless such information be laid within three days after the offence committed:—And that no *action* shall be commenced for any such offence, unless the same be commenced within one calendar month after the offence committed:—And that neither such information or action shall be laid or commenced, unless notice shall be given by the informer to the driver of every such carriage, on the day upon which the offence shall be committed, of an intention to complain of such offence:—And if it shall appear to the justice before whom such complaint shall be made, that the offender lives so remote as to make it inconvenient to summon him to appear before such justice, the justice may dismiss the complaint, and leave the informer to his remedy by action at law.

By *Section 57*, It is provided, That it shall be lawful for the justices of the peace, at their respective General Quarter Sessions of the peace to be held in the week after Michaelmas, to licence in such manner, and for such time, as they shall think fit, an increase of the number of horses to be drawn in carriages up any steep hill, or on any road not turnpike, within their respective jurisdictions, over and above the number hereinbefore limited, if upon inquiry into the state and condition of such roads they shall find any additional number of horses necessary; and from time to time at any Michaelmas Quarter Sessions to revoke, alter, or vary the same as they shall think fit.

And by *Section 58*, If it shall appear upon the oaths of credible witnesses, to the satisfaction of any justice or justices of the peace, or of any court of justice authorized to enforce the execution of this Act, that any waggon, cart, or carriage, could not, by reason of deep snow or ice, be drawn by the number of horses or beasts of draught hereby respectively allowed; then and in every such case, it shall be lawful for such justice or justices of the peace, or court respectively, and they are hereby respectively required, to stop all proceedings before them respectively, for the recovery of any penalty or forfeiture which may have been incurred by drawing with a greater number of horses or beasts of draught, than are hereby allowed; any thing herein contained to the contrary notwithstanding.

And by the same *Section* it is provided, That the regulations hereinbefore mentioned, concerning the number of horses and wheels of carriages shall not extend to carts, waggons, or other carriages, employed only in carry-

ing any one stone, block of marble, cable, rope, or piece of metal, or piece of timber;—Or to such ammunition or artillery as shall be for his Majesty's service.

And by the same *Section* it is further provided, That two oxen or horned cattle shall, for all the purposes of this Act, be considered as one horse.

Regulations in London and Westminster.—With respect particularly to the cities of London and Westminster, and parts adjacent, it is enacted by *Stat. 6 Geo. 1. c. 6*, That no person in London and Westminster, or within ten miles thereof, shall carry at any one load, in waggons or carts having their wheels shod with tire of, or streaks of iron, more than twelve sacks of meal (*a*), of five bushels each, nor more than twelve quarters of malt (*a*), nor more than 700½ of bricks, nor more than one chaldron of coals (*a*), on pain of forfeiting any one of the horses, with the gears, bridles, and halters therewith used, in such manner and to such uses as the penalties directed to be levied and applied by *Stat. 5 Geo. 1. c. 12 (b)*.

And by *Stat. 18 Geo. 2. c. 33*, The wheels of every cart, car, or dray, within the bills of mortality, shall be six inches broad in the felly, and not wrought about with iron, nor be drawn with above the number of three horses, after they are up the hills from the water-side, on pain of 40s., by warrant of one justice, by distress; and for want of distress, on non-payment, in six days' after demand, to be committed till paid:—But this not to extend to any country cart or waggon that shall bring any goods, or

(*a*) Repealed as to meal, malt, and coals, by stat. 11 Geo. 3. c. 51.

(*b*) Now repealed by 7 Geo. 3. c. 42. s. 57.

shall carry any goods half a mile beyond the paved streets of the said cities and places.

Also any person within the said limits, using any cart, car, or dray, having the wheels full six inches broad, when worn, may have the same bound round with tire of iron, provided it be six inches broad, and made flat, and not set on with rose-headed nails.

Depositing annoyances on highways.—By Stat. 13 G. 3. c. 78. s. 9, If any person or persons shall lay in any highway any stone, timber, straw, dung, or other matter, or in making, scouring, or cleansing the ditches or water-courses, shall permit the soil or earth dug out of such ditches, drains, or water-courses, to remain in such highway, in such manner as to obstruct or prejudice the same, for the space of five days after notice (a) thereof given by the surveyor of the highways, every person offending in any of the said cases shall, for every such offence, forfeit and pay the sum of 10s.

And by Section 10, If any stone or timber, or any hay, straw, stubble, or other matter, for the making of manure, or on any pretence whatsoever not tolerated by this Act, shall be laid in any highway within the distance of fifteen feet from the centre thereof, and shall not, within five days after notice (a) given by the surveyor or some person aggrieved thereby, be removed; it shall be lawful for the owner or possessor of the lands adjacent, or any other person or persons whomsoever, by order from some justice of peace, to clear the said highways, by removing the said stone, timber, hay, straw, dung, or other matter,

(a) See Form, Appendix, No. XXXIII.

and to have, take, and dispose of the same to his and their own use.

Obstruction in highways.—By Stat. 13 Geo. 3. c. 78. s. 11, If any person shall wilfully set, place, or leave any waggon, cart, or other carriage, or any plough or instrument of husbandry, in any of the said highways, (except only with respect to such waggon, cart, or carriage, during such reasonable time as the same shall be loading and unloading, and standing as near the side of such highway as conveniently may be (a),) so as to interrupt or hinder the free passage of any other carriage, or of his Majesty's subjects; every person so offending, shall forfeit the sum of 10s. for every such offence.

Damaging causeways, direction-posts, &c.—By Stat. 13 Geo. 3. c. 78. s. 52, After reciting that in some places it hath been and may be found necessary, and the surveyors are hereby authorized and required, to secure horse-causeways and foot-causeways by posts, blocks, or great stones, fixed in the ground, or by banks of earth cast up, or otherwise, from being broken up and spoiled with waggons, wains, carts, or carriages; and forasmuch as several evil-disposed persons do or may wilfully or wantonly pull up, cut down, and remove or damage the said posts, blocks, and great stones, so fixed or to be fixed as aforesaid, and drive carriages upon such banks and causeways, or against the sides thereof, and also dig or cast down the said banks, which are the securities and defence of the said causeways, whereby the causeways or banks are often ruined and destroyed; and such evil-dis-

(a) See the cases of *Rex v. Cross*, 3 Campb. 226: and ante, *Russell*, 6 East, 427, and *Rex v. pp. 441, 442.*

posed persons do or may break, damage, or throw down the stones, bricks, or wood, fixed upon the parapets or battlements of bridges, and do or may pull down, destroy, obliterate, or deface any mile-stone or post, graduated or direction-post or stone, erected or to be erected upon any highway:—For prevention thereof it is enacted, That every person who shall be guilty of any such offence shall, upon complaint thereof made to any justice of the peace of the limit where the same shall be proved to be done, by the oath of any one credible witness, or upon view of the justice himself, forfeit for every of the said offences, any sum not exceeding £5, nor less than 10s.:—And in default of payment thereof, shall be committed to the house of correction of such limit, there to be whipped, and kept to hard labour for any time, not exceeding one calendar month, nor less than seven days, at the discretion of such justice.

Ale-houses not to be kept on bridges.—By Stat. 13 G. 3. c. 78. s. 62, If any person or persons collecting any tolls payable for passing over any public bridge with carriages, or cattle of any kind, shall keep any victualling-house, ale-house, or other place of public entertainment, or shall sell or permit to be sold therein any wine, beer, ale, cider, spirituous liquors, or other strong liquors by retail, he, she, or they, being lawfully convicted of such offence, by the oath of one or more credible witness or witnesses, or by his own confession, before any justice of the peace of the limit wherein such offence shall be committed, shall, for every such offence, forfeit the sum of £5.

As to the drivers of carriages.—By Stat. 1 Geo. 1. st. 2. c. 57. s. 8, If any person, driving any cart, dray, car, or waggon, in the streets of London, shall ride upon the same, not having some other person on foot to guide

the same, he shall, on conviction before the alderman of the ward, or a justice of the peace, on oath of one witness, forfeit 10*s.* by distress and sale; half to the informer, and half to the poor; and in default of payment, be sent to the house of correction, there to be kept to hard labour for three days.

And by *Statute 24 Geo. 2. c. 43. ss. 8. and 9*, If any carter, drayman, carman, waggoner, or other driver, shall ride upon his cart, &c. in London, or within ten miles thereof, not having some person to guide the same, he shall, on the like conviction, forfeit 10*s.* in case such driver shall not be the owner of such carriage; and in case he be the owner, then any sum not exceeding 20*s.*, to be recovered, levied, and applied, as by the aforesaid Act of the 1 Geo. 1. st. 2. c. 57:—And any person, though not a peace officer, may stop and apprehend such offender, and carry him as soon as conveniently may be before a justice; and if any person shall resist, abuse, or prevent any person endeavouring to apprehend such offender, or when he is apprehended, shall rescue, or endeavour to rescue him, he shall forfeit 20*s.* in like manner.

By *Stat. 30 Geo. 2. c. 22. ss. 7. and 12*, If the driver of any carriage within London or Westminster, or in any public street or common highway within the bills of mortality, shall, by negligence or wilful misbehaviour, interrupt the free passage of his Majesty's subjects, he shall, on conviction, by confession or oath of one witness before one justice, forfeit any sum not exceeding 20*s.*, or be committed to the house of correction, or some other prison of the place where the offence shall have been committed or the offender shall have been apprehended, there to be kept to hard labour for any time not exceeding one calendar month. The said forfeiture to be levied by distress

by warrant from such justice; and to be paid, half to the prosecutor, and half to the overseers for the use of the poor of the parish or place where the offence shall be committed, or the offender shall be apprehended; and if there be no overseer, then to some other officer for the use of the poor as aforesaid.

By *Section 13*, Any person, who shall see any offence committed against this Act, may, by authority of this Act, and without any other warrant, apprehend the offender, and shall, with all convenient speed, convey or deliver him to a constable or other peace officer of the place where the offence shall be committed or the offender shall be apprehended, in order to be conveyed before a justice, there to be dealt with according to law.

By *Section 11*, And if he shall refuse to discover his name and place of abode to the justice before whom he shall be brought, he shall be immediately delivered over to a constable or other peace officer, and shall by him be conveyed to the common gaol or house of correction, of the place where the offence shall be committed, there to remain until he shall declare his name and place of abode to the said justice, or to some other justice of such place.

By *Section 14*, Any person shall be admitted to be an evidence, notwithstanding his being an inhabitant of the place where the offence shall be committed.

By *Section 15*, It is provided, That persons punished by this Act shall not be punished by any other law.

The general regulations upon this subject are contained in *Stat. 13 Geo. 3. c. 78. s. 60*, by which it is enacted,

That if the driver of any cart, car, dray, or waggon, shall ride upon any such carriage in any street or highway, not having some other person on foot or on horseback, to guide the same, (such carriages as are conducted by some person holding the reins of the horse or horses drawing the same excepted;)—Or if the driver of any carriage whatsoever, on any part of any street or highway shall, by negligence or wilful misbehaviour, cause any hurt or damage to any person or carriage passing or being upon such street or highway;—Or shall quit the highway, and go on the other side the hedge or fence inclosing the same, or wilfully be at such distance from such carriage, whilst it shall be passing upon such highway, that he cannot have the direction and government of the horses or cattle drawing the same;—Or shall, by negligence or wilful misbehaviour, prevent, hinder, or interrupt the free passage of any other carriage, or of his Majesty's subjects, on the said highways;—Or if the driver of any empty or unloaded waggon, cart, or other carriage, shall refuse or neglect to turn aside and make way for any coach, chariot, chaise, loaded waggon, cart, or other loaded carriage;—Or if any person shall drive, or act as the driver of any such coach, post-chaise, or other carriage, let for hire, or waggon, wain, or cart, not having the owner's name as before required (a), painted thereon, or shall refuse to discover the true christian and surname of the owner of such respective carriages,—Every such driver so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice of peace, or by the oath of one or more credible witness or witnesses, before any justice of the peace for the limit

(a) By sect. 59, see *infra*, p. 496.

where such offence shall be committed, shall, for every such offence, forfeit (a) any sum not exceeding 10s., in case such driver shall not be the owner of such carriage; and in case the offender be owner of such carriage, then any sum not exceeding 20s.; and in either of the said cases shall, in default of payment, be committed to the house of correction for any time not exceeding one month, unless the same shall be sooner paid:—And every such driver, offending in either of the said cases, shall and may, by authority of this Act, with or without any warrant (b), be apprehended by any person or persons who shall see such offence committed, and shall be immediately conveyed or delivered to a constable or other peace officer, in order to be conveyed before some justice of the peace, to be dealt with according to law:—And if any such driver, in any of the cases aforesaid, shall refuse to discover his name, it shall be lawful for the justice of the peace before whom he shall be taken, or to whom any such complaint shall be made, to commit him to the house of correction for any time not exceeding three months, or to proceed against him for the penalty aforesaid, by a description of his person and the offence, and expressing in such proceedings that he refused to discover his name (c).

Names of owners to be painted on waggons, &c.—By Stat. 13 Geo. 3. c. 78. s. 59, For the better discovery of offenders, it is enacted, That the owner of every waggon,

(a) See Form, Appendix, No. LIII.

(b) See Form, Appendix, No. LII.

(c) Various enactments are in force for the regulation of stage

coaches, for which see Burn's Justice, vol. v. tit. "Stage Coaches."

See also stat. 1 Geo. 4. c. 4, as to the punishment of persons occasioning accidents by furious driving.

wain, or cart, and also of every coach, post-chaise, or other carriage, let to hire, shall paint or cause to be painted, upon some conspicuous part of his waggon, wain, or cart, and upon the pannels of the doors of all such coaches, post-chaises, or other carriages, before the same shall be used upon any public highway, his or her christian and surname, and the place of his or her abode, in large legible letters, and continue the same thereupon so long as such waggon, cart, coach, post-chaise, or other carriage shall be used upon any such highway:—And the owner of every common stage waggon or cart, employed as travelling stages from town to town, shall, over and above his or her christian and surname, paint or cause to be painted, on the part and in the manner aforesaid, the following words, *common stage waggon* or *cart*, as the case may be:—And every person using any such carriage as aforesaid upon any highway, without the names and descriptions painted thereon respectively as aforesaid, or who shall paint or cause to be painted any false or fictitious name or place of abode on such waggon, wain, cart, coach, post-chaise, or other carriage, shall forfeit for every such offence, a sum not exceeding £5 nor less than 20s.

General penalty on persons resisting the execution of this Act.—By Stat. 13 Geo. 3. c. 78. s. 71, In case any person or persons shall resist, or make forcible opposition against any person or persons employed in the due execution of this Act, or make any rescue of the cattle or other goods distrained by virtue of this Act;—Or if any constable, headborough, or tythingman, shall refuse or neglect to execute or obey any warrant or precept granted by any justice of the peace, pursuant to the directions of this Act;—Every such person offending therein, and being

convicted thereof by a justice of the peace shall, for every such offence, forfeit any sum not exceeding £10 nor less than 40s., at the discretion of the justice before whom he or she shall be so convicted; to be paid to the surveyor of the ways for the parish, township, or place, where the offence was committed, to be laid out in the repair of the highways:—And in case he or she do not forthwith pay, or secure to be paid, the said forfeiture after such conviction, then it shall be lawful for such justice of the peace to commit such person or persons to the common gaol or house of correction of the limit where such offence shall be committed, there to remain for any time not exceeding three months, unless the said forfeiture shall be sooner paid.

SECONDLY: As to the removal of nuisances and annoyances, and the punishment of the offenders, under the Highway Acts.

Surveyor's duty to take a view of the highways and cause all nuisances, &c. to be removed.—By Stat. 13 G. 3. c. 78. s. 12, It is enacted, That the surveyors of the highways to be appointed by virtue of this Act shall, at all such times and seasons as they shall judge proper, view all the common highways, trunks, tunnels, plats, hedges, ditches, banks, bridges, causeways, and pavements within the parish, township, or place for which they shall be appointed surveyors (a); and in case they shall observe any nuisances, encroachments, obstructions, or annoyances made, committed, or permitted in, upon, or to the prejudice of them or any of them, contrary to the directions

(a) See Form of Surveyor's Return, Appendix, No. LIV.

of this Act, they shall from time to time, as soon as conveniently may be, give or cause to be given to any person or persons doing, committing, or permitting the same; personal notice, or notices in writing (*a*), to be left at his, her, or their usual place or places of abode, specifying the particulars wherein such nuisances, defaults, obstructions, or annoyances consist:—And if such nuisances, obstructions, or annoyances shall not be removed, and the ditches, drains, gutters, and water-courses aforesaid effectually made, scoured, cleansed, and opened, and such trunks, tunnels, plats, and bridges made and laid, and such hedges properly cut and pruned within twenty days after such notice of the same respectively given as aforesaid, then the said surveyors shall be, and they are hereby fully authorized and empowered forthwith to remove such nuisances, obstructions, or annoyances, and open, cleanse, and scour such ditches, gutters, and water-courses, and make or amend such trunks, tunnels, plats or bridges, and cut and prune such hedges for the benefit and improvement of the said highways, to the best of their skill and judgment, and according to the true intent and meaning of this Act (*b*):—And the person or persons so neglecting to make or open and cleanse such ditches, gutters, or water-courses, or cut or prune such hedges, during the time aforesaid, after such notice given, shall forfeit for every foot in length which shall be so neglected, the sum of one penny; and the said surveyors shall be re-imbursed what charges and expences they shall be at in removing such nuisances, obstructions, or annoyances, and making or opening, cleansing or scouring such ditches, gutters,

(*a*) See Form, Appendix, No. XXXIII.

(*b*) See *Boyfield v. Porter*, 13

East, 200, as to the liability of the surveyor for any consequential damage.

and water-courses, and in making or amending such trunks, tunnels, plats, or bridges, and in cutting and pruning such hedges respectively, by the person or persons who ought to have done the same, over and above the said forfeiture : And in case such person or persons shall, upon demand, refuse or neglect to pay the said surveyor his charges and expences occasioned thereby respectively, and also the said forfeiture of one penny *per* foot, then the said surveyor shall apply to any justice of the peace, and upon making oath before him of notice being given to the defaulter in manner aforesaid, and of the said work being done by such surveyor, and of the expences attending the same, the said surveyor shall be repaid by such person or persons all such his said charges (*a*) as shall be allowed to be reasonable by the said justice ;—Or in default of payment thereof on demand, the same shall be levied in such manner as the penalties and forfeitures hereby inflicted are directed to be levied (*b*).

Presentment by a justice.—By Stat. 13 Geo. 3. c. 78. s. 24, Every justice of assize, justices of the Counties Palatine of Chester, Lancaster, and Durham, and of the great sessions in Wales, shall have authority by this Statute, upon his or their own view, and every justice of the peace, either upon his own view, or upon information upon oath to him given by any surveyor of the highways, to make presentment (*c*) at their respective assizes or great sessions, or in the open general quarter sessions of such respective limit, of any highway, causeway, or bridge, not well and sufficiently repaired and amended, or of any other default or offence committed and done contrary to

(*a*) See Form, Appendix, No. XXXIX.

(*b*) See post, page 509.

(*c*) See Form, Appendix, No. LV.

the provision and intent of this Statute:—And that all defects in the repair thereof shall be presented in such jurisdiction where the same do lie, and not elsewhere:—And that every such presentment made by any such justice of assize, counties palatine, great sessions, or of the peace, upon his own view, or upon such information having been given to such justice of the peace upon the oath of such surveyor of the highways as aforesaid, shall be as good and of the same force, strength, and effect in the law as if the same had been presented and found by the oaths of twelve men:—And that for every such default or offence so presented as aforesaid, the justices of assize, counties palatine, and great sessions, at their respective courts, and the justices of the peace at their general quarter sessions, shall have authority to assess such fines as to them shall be thought meet:—Saving to every person and persons that shall be affected by any such presentment, his, her, or their lawful traverse to the same presentment, as well with respect to the fact of non-repair, as to the duty or obligation of repairing the said highways, as they might have had upon any indictment of the same presented and found by a grand jury:—And the justices of the peace at their general quarter sessions, or the major part of them, may, if they see just cause, direct the prosecutions upon such presentments as shall be made at the quarter sessions as aforesaid, to be carried on at the general expence of such limit, and to be paid out of the general rates within the same.

In a late case (*a*), where a magistrate presented a road in the township of F. “upon the information upon oath of A. B. surveyor of the highways for the township

(*a*) *Rex v. The Inhabitants of Fylingdales*, 7 B. & C. 438.

of C. which is 35 miles distant from the township of F :” &c. The Court held, in arrest of judgment, that this presentment was bad, as it did not appear that the information upon oath was given to the *presenting magistrate*; and also because the surveyor of the roads in one township has no authority under the Act to give information as to a road in another township.

A high constable is not authorized by the above clause to make presentment; therefore where he presents persons for a nuisance in a highway, he must go before the grand jury, and give his evidence upon oath (a).

In the case of *Rex v. Winter* (b), a presentment by a magistrate for a *nuisance* in a highway, under the above clause, was held to be bad for want of charging the offence to be against the form of the Statute; as the clause giving the magistrate authority to present, is confined in the terms of it to offences committed and done contrary to the provision and intent of the Act; and therefore, whatever the offence might be, it was only presentable by a magistrate as an offence against the Act. The form of presentment given in the Schedule to the Act, which does not contain the above allegation, is confined to cases of non-repair.

In the above case, the *locus in quo* was a footway; and it was objected to the presentment, that the word *footway* is by the Statute contrasted with the general description of *highway*; and therefore the jurisdiction to present *highways* given to magistrates by the 24th section does

(a) *Rex v. The Bridgewater and Taunton Canal Company*, 7 B. & C. 514.

(b) 13 East, 258.

not extend to footways. But upon this point nothing was said by the Court, as the presentment was overturned in consequence of the informality above noticed.

Any other person than the justice presenting may, with the consent of such justice, conduct the prosecution through its subsequent stages; but the latter, if he consents to another carrying on the prosecution, retains the whole responsibility, and is answerable for the costs, if the presentment should turn out to be improper (*a*).

If a justice of the peace *indicts* a road for being out of repair, and the indictment is afterwards removed by *certiorari*, he is to be considered as acting in the exercise of his magisterial duty, so as to be entitled to costs under *Stat. 5 & 6 W. & M. c. 11. s. 3*, if the defendant be convicted; and *à fortiori*, if the justice *present* the road, he shall have such costs (*b*).

(*a*) *Rex v. The Inhabitants of Penderdyn*, 2 T. R. 260.

(*b*) *Rex v. Kettleworth*, 5 T. R. 33.—And see *per* Ashhurst, J. in *Rex v. Sharpness*, 2 T. R. 47.—The words of the Statute are, “If the defendant prosecuting such writ of *certiorari*, be convicted of the offence for which he was indicted, the Court shall give reasonable costs to the prosecutor, if he be the party grieved, or be a justice of the peace, &c. constable, &c. or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him as officer to

prosecute or present.” It has been decided, that a prosecutor of an indictment for stopping up a way, who had used it for some years before it was stopped, is a party grieved within the meaning of the Act. *Rex v. Williamson*, 7 T. R. 32. And in the case of *Rex v. The Inhabitants of Taunton Saint Mary*, 3 M. & S. 465, several persons were held entitled to costs, as prosecutors of an indictment for not repairing a highway, removed by *certiorari*;—one as constable of the manor within which the highway lay; the others as parties grieved, they having used

As to certiorari.—By the above *Section 24*, It is enacted, That no such presentment, nor any indictment for any such default or offence, shall be removed by *certiorari* or otherwise out of such jurisdiction, till such indictment or presentment be traversed and judgment thereupon given, except where the duty or obligation of repairing the said highways, causeways, or bridges may come in question.

It has been decided, however, that a *certiorari pro rege* lies before traverse (*a*). In this case it was contended, that, notwithstanding the general rule that the King has a right to try his own cause in whatever Court he pleases, yet in the present instance a private person is the real prosecutor, and therefore not entitled to the same privilege. *See per Cur*: "In cases of this sort, there is no distinction; and the words *till the indictment be traversed*, shew very plainly that this clause was not intended to take away a *certiorari* at the instance of the Crown; for the King does not traverse. It was calculated only to prevent the defendants from bringing a *certiorari* for the purpose of delay."

In the case of *Rex v. The Inhabitants of Taunton St. Mary* (*b*), it was decided, that upon an indictment against

the way for many years in passing and repassing from their homes to the next market-town, and being obliged, by reason of the want of repair, to take a more circuitous route. But there must be some special and peculiar injury accruing to the prosecutor from the obstruction, besides that which affects all the subjects in common

with him, to entitle him to costs under the Act. *Rex v. Incedon*, 1 M. & S. 268.

(*a*) *Rex v. The Inhabitants of Bodenham*, Cowp. 78; and see *Rex v. Farewell*, 2 Stra. 1209; and *Rex v. The Inhabitants of Clace*, 4 Burr. 2456.

(*b*) 3 M. & S. 465.

a parish for not repairing a highway, the right to repair may come in question, so as to entitle the parish to remove it by *certiorari*, though the parish plead the general issue (a); for the right to repair comes incidentally in question, inasmuch as the obligation to repair arises out of the inquiry whether it be a public highway. In this case the indictment was removed by *certiorari*, upon an affidavit filed by the defendants, stating, that on the trial the question whether the parish were liable to repair, and the right to repair, would come in issue.

In the case of *Rex v. The Inhabitants of Penegoes and Machynlleth* (b), after the trial by the Quarter Sessions of an indictment and judgment pronounced for the Crown, a motion was made in K. B. for a writ of *certiorari*. But this the Court refused, saying, "The defendants have thought proper to take the chance of succeeding at the Sessions. They ought clearly to have applied for a *certiorari* before the trial, and it ought not to issue in this late stage of the proceedings. They can now avail themselves of objections to the indictment by writ of error only."

The Court may award costs upon indictment, &c.—By Stat. 13 Geo. 3. c. 78. s. 64, It shall be lawful for the Court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said Court that the defence made to such indictment or presentment was frivolous; or to award costs to the person indicted

(a) See ante, p. 477, as to the effect of this plea by the parish.

(b) 1 B. & C. 142.

or presented, to be paid by the prosecutor, if it shall appear to the said Court that such prosecution was vexatious.

The Statute gives only to the Court "before whom the indictment is tried" power to award costs. Therefore, where an indictment for not repairing a road, was removed into the Court of K.B. by *certiorari*, and went down to trial at the Assizes, when the defendants were acquitted for want of prosecution, the Court considered that they were not empowered to award costs, but that the application should have been made to the Judge at *Nisi Prius* (a).

Where upon an indictment for not repairing a way, removed by the prosecutor, the Judge at *Nisi Prius* certifies that the defence was frivolous, the prosecutor shall have his costs, notwithstanding the defendant may have obtained a rule *nisi* to arrest the judgment. Where the judge certifies, it is tantamount to awarding costs; for the Judge at *Nisi Prius* cannot strictly adjudge them; that must be done by a collateral act in the Court above (b).

In the case of *Rex v. Commerell and Ellis* (c), it was decided, that the Court of Quarter Sessions before whom a parish is acquitted, upon the trial of an indictment for not repairing a highway, may, by their order, award C. and E. to pay costs to the parish, although the names of C. and E. be not on the back of the indictment, and although the indictment originated in a presentment of

(a) *Rex v. The Inhabitants of Chadderton*, 5 T. R. 272.

See *Rex v. The Inhabitants of Clifton*, 6 T. R. 344. S. P.

(b) *Rex v. The Inhabitants of St. John, Margate*, 6 M. & S. 130.

(c) 4 M. & S. 203.

A. and B. constables, whose names are on the indictment; and it is sufficient, if the order is intituled as in the prosecution by C. and E., without shewing further that C. and E. are prosecutors; neither need it appear on the face of the order, that the indictment was tried, if that appear by the record of the proceedings; and the order is good in form if it be for the payment of the costs to the solicitor of the parish.

It hath been determined, that if a person indicted for not repairing a road *ratione tenuræ* be convicted, the Court will not inflict a small fine on a certificate of the road being repaired, until the prosecutor's costs are paid (a).

As to expences where inhabitants agree to prosecute or defend any indictment.—By Stat. 13 Geo. 3. c. 78. s. 65, If the inhabitants of any parish, township, or place, shall agree, at a vestry or public meeting (b), to prosecute any person by indictment (c), for not repairing any highway within such parish, township, or place, which they apprehend such person was obliged by law to repair, or for committing any nuisance upon any highways; or shall agree at such vestry meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall be lawful for the surveyor of such parish, township, or place, to charge in his account the reasonable expences incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such inhabitants at a

(a) *Rex v. Wingfield*, 1 W. Bla. 602.

convening such meeting.

(b) See ante, p. 177, as to the

(c) See Forms of Indictment, Appendix, No. L.

vestry or public meeting, or allowed by a justice of the peace within the limit where such highways shall be ; which expences, when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of this Act.

Application of fines for non-repair.—By Stat. 13 Geo. 3. c. 78. s. 47, No fine, issue, penalty, or forfeiture, for not repairing the highways, or not appearing to any indictment or presentment for not repairing the same, shall hereafter be returned into the Court of Exchequer, or other Court, but shall be levied by and paid into the hands of such person or persons, residing in or near the parish, township, or place where the road shall lie, as the Court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied towards the repair and amendment of such highways; and the person or persons so ordered to receive such fine, shall and is hereby required to receive, apply, and account for the same, according to the direction of such Court, or in default thereof shall forfeit double the sum received.

How fines and penalties are to be levied on a parish. By the same Section, If any fine, issue, penalty, or forfeiture to be imposed on any such parish, township, or place, for not repairing the highways, or not appearing as aforesaid, shall hereafter be levied on any one or more of the inhabitants of such parish, township, or place, then such inhabitant or inhabitants shall and may make his or their complaint to the justices of the peace at their special Sessions; and the said justices are hereby empowered and authorized, by warrant under their hands and seals, to cause a rate to be made, according to the

form and manner herein last before prescribed (a), for the reimbursing such inhabitant or inhabitants the monies so levied on him or them as aforesaid; which rate so made, and confirmed by any two justices, shall be collected and levied by the surveyor of the highways of such parish, township, or place so presented or indicted as aforesaid; and the said surveyor shall, within one month next after the making and confirming the rate aforesaid, collect, levy, and pay unto such inhabitant or inhabitants the money so levied on him or them as aforesaid.

An application under the above clause for a rate to reimburse the inhabitants of a parish, on whom a fine for the non-repair of a highway has been levied, ought to be made within a reasonable time after such levy, so that it may be prior to any material change of inhabitants; therefore the Court of K. B. refused a *mandamus* to the justices to make such a rate after an interval of eight years, though applications had been, from time to time, made to the magistrates below, who had declined to make the rate, on the ground that the parish at large had been improperly indicted and convicted, and though, so lately as the year before the application, the magistrates had ordered an account to be taken of the *quantum* expended upon the repairs out of the money levied (b).

As to the recovery and application of penalties, forfeitures, &c.—By Stat. 13 Geo. 3. c. 78. s. 72, All penalties and forfeitures by this Act imposed for any offence against the same, and all costs and charges to be

(a) By Section 45. See ante, page 161.

(b) *Rex v. The Justices of Lancashire*, 12 East, 366.

allowed and ordered by the authority of this Act (the manner of levying and recovering of which is not hereby otherwise particularly directed) shall be levied by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant (a) under the hand and seal of some justice of the peace for the limit where such offence, neglect, or default shall happen, or such order for payment of such costs or charges shall be made, rendering the overplus of such distress (if any be) to the party or parties, after deducting the charges of making the same; which warrant such justice is hereby empowered and required to grant, upon conviction of the offender, by confession, or upon the oath of one or more credible witness or witnesses, or upon order made as aforesaid:—And the penalties and forfeitures, when so levied, shall be paid, the one half to the informer, and the other half to the surveyor of the highway where such offence, neglect, or default shall happen, to be applied towards the repair thereof, unless otherwise directed by this Act; but in case the surveyor shall be the informer, then the whole shall be employed towards the repair of such highway:—And in case such distress cannot be found (b), and such penalties and forfeitures, or the said costs and charges shall not be forthwith paid, it shall be lawful for such justice, and he is hereby authorized and required, by warrant under his hand and seal (c), to commit such offender or offenders, or person or persons liable to pay the same respectively, to the common gaol or house of correction, of the limit where the offence shall be committed, or such order as afore-

(a) See Forms, Appendix, No. LVI. to LX. inclusive.

(b) See Form of Return, Appendix, No. LXI.

(c) See Form, Appendix, No. LXII.

said shall be made, for any time not exceeding three months, unless the said penalty, forfeiture, costs and charges shall respectively be sooner paid :—And if such offender or offenders, or person or persons liable or ordered to pay the same respectively, shall live out of the jurisdiction of the justice hereby authorized to grant such warrant, it shall be lawful for any justice of the peace of the limit wherein such person shall inhabit, and every such justice is hereby required, upon request to him for that purpose made, and upon a true copy of the conviction whereby such forfeiture or penalty was incurred, and of the order for the payment of such costs and charges, produced and proved by a credible witness upon oath, by warrant under his hand and seal, to cause the penalty or forfeiture mentioned in such conviction, and the costs and charges mentioned in such order, or so much thereof as shall not have been paid, to be levied by distress and sale of the goods and chattels of such offender or offenders, or person or persons liable or ordered to pay the same respectively as aforesaid ; And if no sufficient distress can be had, to commit such offender or offenders, or person or persons liable as aforesaid, to the common gaol or house of correction of such limit, for the time and in manner aforesaid.

But by *Section 73*, it is provided, That no warrant of distress, unless otherwise directed by this Act, shall be issued for levying any penalty or forfeiture, costs or charges, until six days after the offender shall have been convicted, and an order made and served upon him or her for the payment thereof.

By *Section 74*, Every prosecutor or informer may, at his election, sue for and recover any forfeiture or pe-

nalty imposed by this Act, which shall amount to the sum of 40*s.* or upwards (the manner of recovery thereof not being particularly directed by this Act), either in the manner hereinbefore directed, or by action at law to be brought by such informer or prosecutor in any of his Majesty's Courts of Record, in manner following: (that is to say), where any person shall be liable to any such pecuniary penalty, it shall be lawful to sue for and recover the same by action of debt, in which it shall be sufficient to declare, that the defendant is indebted to the plaintiff in the sum of —, being forfeited by an Act passed in the 13th year of the reign of his present Majesty [Geo. 3.] intituled "*An Act to explain, amend, and reduce into one Act of Parliament, the Statutes now in being for the amendment and preservation of the public highways within that part of Great Britain called England, and for other purposes.*" and the plaintiff, if he recovers in any such actions, shall have double costs.

By *Section 75*, it is provided, That there shall not be more than one recovery for the same offence; and that ten days' notice in writing be given to the party offending, previous to the commencement of such actions; and that the same be brought and commenced within one calendar month after the offence for which such action is brought shall have been committed.

By *Section 76*, it is also provided, That no conviction shall be had or made by virtue of this Act, unless upon confession of the party accused, or upon the oath of one or more credible witness or witnesses, or upon the view of a justice of the peace, in the cases before-mentioned.

By *Section 78*, it is enacted, That where any distress shall be made for any sum or sums of money to be levied

by virtue of this Act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any default or want of form in any proceedings relating thereto; nor shall the party or parties distraining be deemed a trespasser or trespassers *ab initio*, on account of any irregularity which shall be afterwards done by the party or parties distraining; but the person or persons aggrieved by such irregularity, may recover full satisfaction for the special damage, in an action on the case.

But by *Section 79*, it is provided, That no plaintiff or plaintiffs shall recover in any action for any irregularity, trespass, or wrongful proceedings, if tender of sufficient amends shall be made by or on behalf of the party or parties who shall have committed, or cause to be committed, any such irregularity, trespass, or wrongful proceedings, before such action brought:—And in case no such tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he or they shall see fit, whereupon such proceedings or orders and judgments shall be had, made, and given in and by such Court, as in other actions where the defendant is allowed to pay money into Court.

Property to be laid in surveyor generally.—By *Stat. 7 Geo. 4. c. 64. s. 16*, In any indictment or information for any felony or misdemeanor, committed on or with respect to any materials, tools, or implements provided for any highway, otherwise than by the trustees of any turnpike road, it shall be sufficient to aver that any such

things are the property of the surveyor, and it shall not be necessary to specify the name of such surveyor.

As to witnesses, &c.—By *Stat.* 13 Geo. 3. c. 78. s. 68, The surveyor of any parish, township, or place shall be deemed in all cases a competent witness, in all matters relative to the execution of this Act, notwithstanding his salary may arise in part from the forfeitures and penalties hereby inflicted.

And by *Section* 76, Any inhabitant of any parish, township, or place, in which any offence shall be committed, contrary to this Act, shall be deemed a competent witness, notwithstanding his or her being an inhabitant of such parish, township, or place.

But the testimony of an inhabitant is not valid evidence in proceedings for the non-repair of a way (a).

Justices to administer oaths.—By *Stat.* 13 Geo. 3. c. 78. s. 77, it is enacted, That it shall be lawful for any justice of the peace to administer an oath to any witness or witnesses, or other person or persons, for the better discovery and execution of the several matters or things hereinbefore authorized or directed to be examined, inquired into, or performed by such justice.

Power of appeal.—By *Stat.* 13 Geo. 3. c. 78. s. 80, it is enacted, That if any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, or other person, in the execution of any of the powers given by this Act, and for which no particular method of relief hath been already appointed, every such person may appeal to the justices of

(a) See ante, p. 479.

the peace at any General Quarter Sessions of the peace, to be held for the limit wherein the cause of such complaint shall arise; such appellant giving, or causing to be given, notice in writing (a) of his or her intention to bring such appeal, and of the matter thereof, to the justice or other person or persons against whom such complaint shall be made, within six days after the cause of such complaint arose, and within four days after such notice, entering into recognizance before some justice of the peace within such limit, with one sufficient surety, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such Quarter Sessions:—And every justice of the peace and other person, having received notice of such appeal as aforesaid, shall return all proceedings whatsoever had before them respectively, touching the matter of such appeal, to the said justices at their General Quarter Sessions aforesaid, on pain of forfeiting £5 for every such neglect:—And the said justices at such Sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they the said justices shall think proper, to be levied and recovered as hereinbefore directed; and the determination of such Quarter Sessions shall be final and conclusive to all intents and purposes:—Provided that no such appeal shall be made against any conviction for any penalty or forfeiture incurred by virtue of this Act, unless the person convicted shall, at the time of such conviction, if he or she shall be then present, if not, within six days after, give notice of his or her intention to appeal, and at the same time

(a) See Form, Appendix, No. LXIII.

enter into recognizance, with sufficient surety, to pay such penalty or forfeiture, in case such conviction shall be affirmed upon such appeal; and upon his or her giving such security, the further proceeding for such penalty or forfeiture shall be suspended until such appeal shall be heard and determined.

It is decided, that parties aggrieved by the appointment of a surveyor are empowered to appeal to the Quarter Sessions, under the above clause (a). But no such appeal lies against the passing of the surveyor's accounts, as another mode of proceeding relative thereto is directed by the 48th section (b).

In a late case (c), a rule was obtained for a *mandamus* to the justices of Devon, to receive an appeal against a distress for non-payment of a sum assessed under the Highway Act. The party assessed having refused to pay, a warrant of distress was signed and granted by two justices on the 4th of December, which was executed on the 12th; the party thereupon gave notice of appeal within six days after the 12th of December. The Sessions dismissed the appeal, being of opinion that notice ought to have been given within six days after the *date* of the warrant, not the *execution* of it. It was contended against the motion, that the notice which was directed to be given "within six days after the cause of complaint arose," must mean, six days after the *date* of the warrant, which was the cause of complaint, not the levy, which was only consequent upon it. It was also objected, that the notice merely stated a distress was made, without disclosing the grounds. *Sed per* Lord Ellenborough,

(a) *Rex v. The Justices of St. Alban's*, 3 B. & C. 698; and ante, p. 111.

(b) See ante, p. 122.

(c) *Rex v. The Justices of Devon*, 1 M. & S. 411.

C. J. "Suppose notice of action against a magistrate for taking goods, would it not be sufficient to state that he had taken the goods under a warrant, and that the party intended to bring an action thereupon? The *onus* lies on the other side to shew the legality of the distress; the party aggrieved need not enter into a special argument in his notice: if he point out the matter of the appeal, it will be sufficient without assigning special causes on which perhaps, he might be turned round. Then as to the time, the party appealing was within six days after he was actually damnified. It is not necessary he should appeal on the warrant; for *non liquet* that it will be proceeded upon." And the rule was made absolute.

Proceedings not to be quashed for want of form, or removed by certiorari.—By Stat. 13 Geo. 3. c. 78. s. 80, No proceedings to be had or taken in pursuance of this Act, shall be quashed or vacated for want of form, or removed by *certiorari*, or any other writ or process whatsoever (except as hereinbefore mentioned) into any of his Majesty's Courts of Record at Westminster, any law or statute to the contrary notwithstanding.

Yet if the justices, under pretence of the jurisdiction given them by the Statutes, take upon them to do a thing manifestly exceeding their authority (as where the Court of Quarter Sessions received an appeal against the passing of the surveyor's accounts, which they are not permitted to do), the proceedings may be removed by *certiorari* into the King's Bench, and there quashed (*a*).

(a) See 1 Hawk. P. C. 76. s. 214; and *Rex v. The Justices of the West Riding of Yorkshire*,

5 T. R. 629; and *Rex v. The Justices of Somersetshire*, 5 B. & C. 816.

And where the prosecutor had enlarged the rule for shewing cause why the order should not be quashed, the Court of K. B. held that he was thereby precluded from objecting to the issuing of the *certiorari* (a).

In the case of *Rex v. The Justices of St. Alban's* (b), the Counsel for the Crown contended, that where an appeal is not given a *certiorari* still lies, as the *certiorari* is taken away by a subsequent part of the clause which gives the power of appeal. And they cited the cases of *Rex v. The Justices of the West Riding of Yorkshire*, and *Rex v. Mitchell* (c). Those cases, however, do not give the slightest colour to the argument which they were quoted as supporting. And Abbott, C.J. was of opinion that the argument itself was untenable.

Limitation and mode of prosecuting actions.—By Stat. 13 Geo. 3. c. 78. s. 81, If any action or suit shall be commenced against any person or persons for any thing done or acted in pursuance of this Act, then and in every such case such action or suit shall be commenced or prosecuted within *three* calendar months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought within the county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit, shall and may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this present Act:—And if the same shall appear to have been so done, or if any such action or suit shall be brought after the time limited for

(a) *Rex v. Hartshorn*, 2 Barr. 745.

(b) 3 B. & C. 698.

(c) 5 T. R. 629 and 701.

bringing the same, or be brought or laid in any other place than as before mentioned, then the jury shall find for the defendant or defendants; or if the plaintiff or plaintiffs shall become nonsuit or discontinue his, her, or their action, after the defendant or defendants shall have appeared, or if upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for the recovery thereof, as any defendant or defendants hath or have in any other cases by law.

In the case of *Roberts v. Read and others* (a), it appeared that the surveyors of the highways, in the execution of their office, had undermined a wall adjoining to the highway, but which did not fall till more than three months afterwards; and the Court of K. B. held, that the surveyors were subject to an action on the case for the consequential injury, if brought within three months after the falling of the wall.

And in *Sutton v. Clarke* (b), it was observed by Gibbs, C. J. that the case of *Roberts v. Read*, let the plaintiff loose from the very great difficulty imposed by the words (which, it might be, were very absurd and unjust) of making the act done, and not, as in the *Stat. 21 Jac. 2. c. 16*, the cause of the action, the criterion of the time. The Court of K. B. had got over that difficulty, and attained the justice of the case; he should have had great difficulty in coming to that decision, but thought the Court ought not to recede from it, because it favored the attainment of justice. But in this case the Court ultimately refrained from expressing any opinion upon this very important question.

(a) 16 East, 315.

(b) See 6 Taunt. 40, note b.

In the case of *Boothby v. Morton* (a), however, where the surveyor to certain drainage commissioners had cut a ditch of unusual width and depth, and thrown the soil, &c. on the land of the plaintiff, whereby his crop of cole-seed was spoiled, and some of his sheep drowned; and it appeared that the ditch was dug about a year before the commencement of the action, but the sheep were drowned and the crop spoiled within six months of such commencement (which was the period of limitation fixed by the Act): It was held that the action ought to have been brought within six months *from the digging of the ditch*. It is difficult to reconcile this decision with that in the case of *Roberts v. Read*.

I shall conclude with the following observations as to the nature of this kind of legislative protection, which are made by Mr. Justice Bayley in the case of *Cook v. Leonard* (b): He says, "Where a Statute gives protection to persons acting in execution or in pursuance of it, all persons acting under its provisions are entitled to that protection, although they exceed their authority by so doing. There must, however, be some limits to that rule, and it seems to me that there are cases which warrant this distinction. If an officer does any act, part of which is and part of which is not authorized by the Statute; or if a magistrate acts in a case which his general character authorizes him to do, the mere excess of authority in either case does not deprive the officer or magistrate of that protection which is conferred upon those who act in execution of it; but where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that protection."

(a) 3 B. & B. 239.

(b) See 6 B. & C. 353.

SECTION III.

As to nuisances and annoyances under the Turnpike Acts.

FIRST: *What nuisances and annoyances are prohibited by the Turnpike Acts.*

Using railway-carts.—By Stat. 4 Geo. 4. c. 95. s. 16, A penalty is inflicted for using carriages, made for railways or tram roads, upon a turnpike road (*a*).

Making encroachments upon or working injury to the road, or causing annoyances to the passengers, &c.—By Stat. 3 Geo. 4. c. 126. s. 118, If any person shall make, or cause to be made, any dwelling-house or other building, or any hedge or other fence on or at the sides of any turnpike road, in such manner as to reduce the breadth or confine the limits thereof, or shall fill up or obstruct any ditch at the side thereof;—or shall make or cause to be made any dwelling-house or other building, or any hedge or other fence on any common or waste land on the side or sides of any turnpike road, within the distance of thirty feet, if within three miles of any market-town, or if beyond that distance, within twenty-five feet from the middle or centre thereof (*b*);—or shall make any drain, gutter, sink, or water-course across, or otherwise break up or injure the surface of any turnpike road, or of any part thereof;—or shall plough, harrow, or break up the soil of any land, or ground, or in ploughing or harrowing the adjacent lands, shall turn his or their plough

(*a*) See this clause, ante, page 312.

what is considered the centre of the road.

(*b*) See ante, page 313, as to

or harrow in or upon any land or ground within the distances aforesaid from the middle or centre of any turnpike road made or to be made, or make any other encroachment on any turnpike road within the distances aforesaid from the middle or centre thereof;—every person so offending shall forfeit, for every such offence, 40s. to such person as shall make information of the same; and it shall be lawful for the trustees who have the care of any such road, to cause such dwelling-house or other building, hedge, ditch or fence, drain, sink, water-course, gutter, or other encroachment to be taken down or filled up, or where any ditch shall be filled up or obstructed, to be opened and cleansed, at the expence of the person or persons to whom the same shall belong:—And it shall be lawful for any one or more justice or justices of the peace of the county where such offence shall be committed, upon proof thereof to him or them made upon oath, to levy as well the expences of taking down or filling up, or cleansing such dwelling-house or other building, hedges, ditches, drains, or other encroachments as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offender's goods and chattels, rendering the overplus (if any) to the owner on demand.

By *Stat. 3 Geo. 4. c. 126. s. 119*, A penalty of any sum not exceeding £10, is imposed upon persons damaging mile-stones, guide-posts, or boundary stones (*a*).

By *Stat. 4 Geo. 4. c. 95. s. 72*, If any person or persons whomsoever shall wilfully pull down, break, injure, or damage any table of tolls put up or fixed at any toll-gate or bar on any part of any turnpike road, or wilfully

(*a*) See this clause, ante, p. 320.

or designedly deface or obliterate any of the inscriptions, letters, figures, or marks thereon;—or if any person or persons shall wilfully pull up, throw down, break, injure, or damage any posts, rails, or fences placed or to be placed or put up by order of any trustees of any turnpike road, or their surveyor or surveyors, either by the side or sides of such road, or at or near to any pit or quarry which shall be used, opened, or made, for the getting of stones, gravel, or other materials for the purposes thereof, in order to prevent accidents;—or if any person or persons shall wilfully cause any damage or injury to be done to any bridge, arch, wall, or other building or erection to be set up or erected by virtue of any Act on any part of any turnpike road, or by the side or sides thereof;—or if any person or persons shall cast or throw any earth, or rubbish, or other matter or thing, into any drain, ditch, culvert, tunnel, or other water-course made by virtue of any Act, so as to obstruct the water from running or draining off any turnpike road;—or if any person or persons shall, without being thereto authorized by the surveyor or surveyors for the time being acting under any Act, shovel up, scrape, gather, or carry away any stones, gravel, sand, or other materials, slutch, dirt, mire, drift, or soil, from off any footpath or causeway, or any other part of such road;—or if any person shall in any manner wilfully prevent any other person or persons from passing him or her, or any carriage under his, her, or their care, upon any such road;—or if any such person shall dig, make, or use any pit or pits for sawing of timber or wood within thirty feet of the centre of any such turnpike road, unless where inclosed by a fence from any such road;—every person offending in any of the cases aforesaid shall forfeit and pay a sum not exceeding 40*s.* for every such offence; and one moiety of such penalties shall be paid to the in-

former, and the other moiety thereof shall be paid to the treasurer of the trustees of such turnpike road, and applied towards the repair of such road.

By *Statute 3 Geo. 4. c. 126. s. 128*, If any person or persons whatsoever shall wilfully or maliciously pull down, pluck up, throw down, level, or otherwise destroy or damage any turnpike gate, or any chain, rail, post, or bar, or other fence or fences belonging to any turnpike-gate, or any other chain, bar, or fence of any kind whatsoever set up or erected, or hereafter to be set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act or Acts of Parliament relating thereto, or any house or houses erected or to be erected for the use of any such turnpike-gate or turnpike-gates, or any weighing engine;—or shall forcibly rescue any person or persons being lawfully in custody of any officer or other person, for any of the offences before mentioned;—then and in any of the said cases every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be transported to one of his Majesty's plantations abroad for seven years, or in mitigation thereof shall suffer such other punishment as the Court may direct, as in cases of petit larceny.

By *Section 121*, If any person or persons shall ride upon any footpath or causeway, by the side of any turnpike road made or set apart for the use or accommodation of foot passengers, or shall lead or drive any horse, ass, mule, swine, or cattle, or carriage of any description, or any wheelbarrow, truck, or sledge, or any single wheel of any waggon, cart, or carriage apart therefrom, upon any such footpath or causeway, or shall cause any injury or damage to be done to the same, or the hedges, posts,

rails, or fences thereof;—or shall wilfully pull down or damage any bridge, wall, or any other building or erection made by the trustees of any turnpike road, or repaired or repairable by them;—or shall haul or draw, or cause to be hauled or drawn, upon any part of such turnpike road, any timber, stone, or other thing, otherwise than upon wheeled-carriages, or shall suffer any timber, stone, or other thing, which shall be carried principally or in part upon wheeled-carriages, to drag or trail upon such road to the prejudice thereof;—or shall use any tipstick, joggle, or other instrument for the purpose of retarding the descent of any cart or other carriage down any hill, in such manner as to destroy, injure, or disturb the surface of any turnpike road;—or shall in or upon such road, or by the side or sides thereof, or in any exposed situation near thereto, kill, slaughter, singe, scald, burn, dress, or cut up any beast, swine, calf, lamb, or other cattle;—or if any person driving any horse or other beast on the said road, carrying any iron bar or rod, basket or pannier, or any other matter or thing, shall place such bar or rod, basket or pannier, matter or thing, so that the same or any of them shall project more than thirty inches from the side of such horse, or other beast, or so as in any manner to obstruct or impede the passage of any person, or any horse, beast, or carriage travelling along such turnpike road;—or if any hawker, higgler, gipsy, or other person or persons travelling with any machine, vehicle, cart, or other carriage, with or without any horse, mule, or ass, shall pitch any tent, booth, stall, or stand, or encamp upon or by the sides of any part of any turnpike road;—or if any blacksmith or other person occupying a blacksmith's shop, situate near any turnpike road, and having a window or windows fronting the said road, shall not, by good and close shutters, every evening after it

becomes twilight, bar and prevent the light from such shop shining into or upon the said road;—or if any person or persons shall make, or assist in making, any fire or fires commonly called bonfires, or shall set fire to or wantonly let off or throw any squib, rocket, serpent, or other fire-work whatsoever, within 80 feet of the centre of such road;—or bait or run, for the purpose of baiting, any bull, or play at foot-ball, tennis, fives, cricket, or any other game or games upon such road or upon the sides thereof, or in any exposed situation near thereto, to the annoyance of any passenger or passengers;—or if any person shall leave any waggon, wain, cart, or other carriage whatever upon such road, or on the side or sides thereof, without any proper person in the sole custody or care thereof, longer than may be necessary to load or unload the same, except in cases of accident, and in cases of accident for a longer time than may be necessary to remove the same, or shall not place such waggon, wain, or other carriage during the time of loading or unloading the same, or of taking refreshment, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto;—or shall lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon such road, or on the side or sides thereof, or the footpaths or causeways adjoining, to the prejudice of such road or footways, or to the prejudice, annoyance, interruption, or personal danger of any person or persons travelling thereon;—or shall suffer any water, filth, dirt, or other offensive matter or thing whatsoever, to run or flow into or upon such road or footpaths, from any house, building, erection, lands or premises adjacent thereto;—or if any person driving any pigs or swine upon such road shall suffer such pigs or swine to root up or damage such

road, or the fences, hedges, banks, or copse on either side thereof respectively;—or if any person shall, after having blocked or stopped any cart, waggon, or other carriage, in going up a hill or rising ground, cause or suffer to be or remain on such road the stone or other thing with which such cart or other carriage shall have been blocked or stopped;—or if any person or persons shall pull down, damage, injure, or destroy any lamp or lamp-post put up, erected or placed in or near the side of any turnpike road or toll-house erected thereon, or shall extinguish the light of any such lamp;—every person offending in any of the cases aforesaid shall, for each and every such offence, forfeit and pay any sum not exceeding 40*s.* over and above the damages occasioned thereby.

By *Stat.* 7 & 8 Geo. 4. c. 24. s. 16, If any person shall injure, damage, incumber, ride upon, drive upon, or otherwise use any public footpath or causeway, by the side of and adjacent to any turnpike road, to the prejudice, annoyance, interruption, or personal danger of any person travelling thereon, every person so offending shall be liable to the same penalties in respect of such offences as by the Acts hereinbefore recited (*a*) are imposed in respect of such offences, whether such footpath or causeway be made, maintained and repaired by the trustees of the turnpike road thereunto adjoining, or by the inhabitants of the parish wherein such footpath or causeway is situated, or by any other person whatever.

By *Stat.* 3 Geo. 4. c. 126. s. 125, It is enacted, That no door or gate of any building, park, paddock, field, or inclosure whatsoever, shall be made to open into or

(*a*) 3 Geo. 4. c. 126, and 4 Geo. 4. c. 95.

towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered to continue so to open, except the hanging-post thereof shall be fixed or placed so far from the centre of any part of such turnpike road, as that no part of such door or gate shall, when open, project over any part of such turnpike road, or any footpaths belonging thereto; and the occupier or occupiers of any building, park, paddock, field, or inclosure having any door or gate opening outwards, contrary to the meaning of this Act, shall, within fourteen days after notice to him, her, or them given, either personally or in writing, from the surveyor of any turnpike road, cause such door or gate to be hung so that no part of the same, when open, shall project over any part of such turnpike road, or any footpath belonging thereto:—And in default thereof, the surveyor of the said turnpike road is hereby authorized to cause the door or gate to be hung according to the intention of this Act; and the person or persons guilty of such neglect or default shall, upon complaint made to any justice or justices of the peace acting in and for the county or place where such neglect shall appear, and upon conviction upon the oath of one credible witness, pay to such surveyor such sum as the said justice or justices shall direct, to defray the expence of making the alteration and hanging such door or gate, and shall also forfeit a further sum not exceeding 40s. for his, her, or their, neglect therein, to be fixed by and at the discretion of the justice or justices before whom such conviction shall be made.

By *Section 127*, No person shall hereafter erect or cause any windmill to be erected within the distance of 200 yards from any part of any turnpike road, under the penalty of £5 for each and every day such windmill shall

continue:—Provided always, that nothing herein contained shall be construed to render legal the re-erection or continuance of any windmill in any case where by the common law such windmill shall be a public or private nuisance.

By *Stat. 4 Geo. 4. c. 95. s. 76*, If any person or persons, having the care of any waggon, wain, cart, or other such carriage, conveying goods for hire or reward, or for sale, on any turnpike road, shall not chain or fasten any dog that may be attending him or them on such road to such waggon, wain, cart, or carriage, every person so offending shall forfeit and pay any sum not exceeding 20s.

Owner's name to be painted on waggons, &c.—By *Stat. 4 Geo. 4. c. 95. s. 15*, For the better discovery of offenders, it is enacted, That the owner or owners of every waggon, wain, or cart, or other such carriage, shall, from and after the 1st day of October, 1823, paint or cause to be painted in one or more straight line or lines upon some conspicuous part of the right or off-side of his, her, or their waggon, wain, or cart, or other such carriage, or upon the off-side shafts thereof, before the same shall be used on any turnpike road, his, her, or their christian and surname, and the place of his, her, or their abode, or the christian and surname and place of abode of the principal partner or owner thereof, at full length in large legible letters, not less than one inch in height, and continue the same thereupon so long as such waggon, wain, cart, or other such carriage, shall be used upon any turnpike road:—And every owner and proprietor of any waggon, wain, or cart, or other carriage, who shall use or allow the same to be used on any turnpike road, without the names and descriptions painted thereon as aforesaid, or who shall paint

or cause to be painted, any false or fictitious name or place of abode on such waggon, wain, or cart, or other carriage, shall forfeit and pay for every such offence, a sum not exceeding £5.

Regulations respecting drivers of carriages.—By Stat. 3 Geo. 4. c. 126. s. 180, It is enacted, That it shall be lawful for any person to act as the driver of two carts on any turnpike road, and for such carts to pass and travel on any turnpike road being only under the care and superintendence of such single person:—Provided always, that such carts when under the care of only one person, shall not be drawn by more than one horse each, and the horse of the hinder cart shall be attached by a rein or reins to the back of the cart which shall be foremost:—And in case the said horse shall not be so attached, the driver of the said carts shall forfeit the sum of 20s., to be recovered as other penalties are by this Act to be recovered:—Provided also, that this enactment shall not extend, or be construed to extend to carts travelling on any turnpike road within ten miles of the cities of London or Westminster.

By Section 131, After reciting, that numbers of carts and waggons, and frequently more than one, are entrusted to the care of children, who are unable to guide the horses drawing the same, It is enacted, That no cart or waggon travelling on any turnpike road shall be driven by any person or persons who shall not be of the full age of thirteen years, under a penalty not exceeding 10s. to be paid by the owner of such cart or waggon.

By Section 132, After reciting, that many accidents happen, and great mischiefs are frequently done, upon

streets and highways, being turnpike roads, by the negligence or wilful misbehaviour of persons driving carriages thereon, It is enacted, That if the driver of any waggon or cart of any kind shall ride upon any such carriages in any turnpike road, not having some other person on foot or on horseback to guide the same (such light carts as are usually driven with reins, and are then conducted by some person holding the reins of the horse or horses, not being more than two, drawing the same, excepted;)—Or if the driver of any carriage whatsoever on any part of any turnpike road shall, by negligence or wilful misbehaviour, cause any hurt or damage to any person or carriage passing or being upon such road;—Or shall quit the road and go on the other side the hedge or fence inclosing the same, or wilfully be at such distance from such carriage, or in such a situation whilst it shall be passing upon such turnpike road, that he cannot have the direction and government of the horses or cattle drawing the same;—Or if any person shall drive, or act as the driver of any such coach, post-chaise, or other carriage let for hire, or waggon, wain, or cart, not having the owner's name, as hereby required, painted thereon, or shall refuse to discover the true christian and surname of the owner or principal owners of such respective carriage;—Or if the driver of any waggon, cart, coach, or other carriage whatsoever, meeting any other carriage, shall not keep his or her carriage on the left or near side of the road, or if any person shall in any manner wilfully prevent any other person or persons from passing him or her, or any carriage under his or her care upon such road, or by negligence or misbehaviour prevent, hinder, or interrupt the free passage of any carriage, or of his Majesty's subjects on any turnpike road;—every driver so offending in

any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice of the peace, or by the oath of one or more credible witness or witnesses, before any justice of the peace of the limit where such offence shall be committed, or where such offender shall be apprehended, shall, for every such offence, forfeit any sum not exceeding 40s., in case such driver shall not be the owner of such carriage; and in case the offender be the *owner* of such carriage, then any sum not exceeding £5;—And in either of the said cases shall, in default of payment, be committed to the house of correction for any time not exceeding one month, unless such forfeiture shall be sooner paid:—And every such driver offending in either of the said cases, shall and may, by the authority of this Act, with or without any warrant, be apprehended by any person or persons who shall see such offence committed, and shall be conveyed before some justice of the peace, to be dealt with according to law:—And if any such driver, in any of the cases aforesaid, shall refuse to discover his name, it shall be lawful for the justice of the peace before whom he shall be taken, or to whom any such complaint shall be made, to commit him to the house of correction for any time not exceeding three months, or to proceed against him for the penalty aforesaid by a description of his person and the offence only, without adding any name or designation, but expressing in the proceedings that he refused to discover his name.

By *Stat. 4 Geo. 4. c. 95. s. 73*, In case the driver of any waggon, cart, or of any coach or other carriage, shall offend against any of the provisions of any Act for making or maintaining any turnpike road or the said re-

cited Act (a) on this Act, whereby any penalty shall be incurred, and shall refuse to give his name, or shall abscond or absent himself so as not to be found, then it shall be lawful for any justice of the peace before whom complaint shall be made, and he is hereby required to issue a summons requiring the owner of such waggon, cart, or other carriage to appear before him to answer the matter of such complaint:—And if such owner shall refuse or neglect to appear, or appearing shall not then, or within ten days thereafter, produce the driver so offending, or disclose his name and place of abode, then the said justice, or any other justice of the peace, on an examination of the circumstances, and ascertaining by the examination of witnesses on oath that such offence has been committed by any such driver of any waggon, cart, or other carriage, shall order and adjudge that the penalty incurred by such driver shall be paid by the owner of such waggon, cart, or other carriage; which penalty shall be recovered and applied in manner directed by *Stat. 3 Geo. 4. c. 126.*

Cattle straying.—By *Stat. 4 Geo. 4. c. 95. s. 75*, If any horse, ass, sheep, swine, or other beast or cattle of any kind, shall at any time be found tethered, or wandering, straying, or lying about on any turnpike road or on any part thereof (except on such parts of any road as lead or pass through or over any common or waste or uninclosed ground,) it shall be lawful for any surveyor of the road where the same shall be found, or any other person or persons whomsoever, to seize and impound every such horse, ass, sheep, swine, or other beast or cattle, in the common pound (if any) of the parish, township, tithing,

(a) 3 Geo. 4. c. 126.

or place where the same shall be found, or in such other place as the trustees of the road where the same shall be found shall have provided or shall provide for that purpose, and the said horse, ass, sheep, swine, or other beast or cattle there to detain, until the owner or owners thereof shall, for every horse, ass, sheep, swine, or other beast or cattle so impounded, pay the sum of 2*s.*, together with the reasonable charges and expences of impounding and keeping the same, to the treasurer, clerk, or surveyor of the road on which the beast so impounded shall have been found; the said sum of 2*s.* to be applied to the use of and in aid of the tolls of such road:—And in case the said penalty, charges, and expences shall not be paid within five days after such impounding, (notice being thereof first given to the owner, if known, at the time, or if not known, by affixing written notices at the two next toll-gates on the road nearest to the place where the same shall be impounded,) it shall be lawful for any one or more justice or justices of the peace of the county or place where the offence shall have been committed, to order every such horse, ass, sheep, swine, or other beast or cattle to be sold, except where it shall be made to appear to such justice or justices that the horse, ass, sheep, swine, or other beast impounded escaped from any inclosure by any gate or fence being wilfully or negligently left open, or destroyed by any person not being owner or occupier of such inclosure, or employed by such owner or occupier, in which case such justice or justices may remit the said penalty; and the money arising from such sale, after deducting the said penalty, and charges and expences of impounding, keeping, and selling every such horse, ass, sheep, swine, or other beast or cattle, shall be paid to the person whose property the same so sold shall appear to have been:—And in case the owner thereof shall not

be known, and no application shall be made for the money arising from such sale within twenty-one days after such sale shall have taken place, the said money shall be applied, after deducting the said charges and expences, in the same manner as the said penalty of 2s. is hereinbefore directed to be applied:—Provided always, that no owner of any horses, asses, sheep, swine, or other beasts or cattle impounded as aforesaid, shall in any case pay more than the sum of £5 over and above the charges and expences of impounding and keeping the same, for any number of horses, asses, sheep, swine, or other beasts or cattle impounded at one time:—And provided always, that nothing in this clause shall be deemed, taken, or construed to extend to take away any right of pasturage which may exist on the sides of any turnpike roads (a).

Penalty upon pound-breach.—And by Stat. 3 Geo. 4. c. 126. s. 123, In case any person or persons shall release or attempt to release any cow, horse, ass, swine, or other live stock or cattle, which shall be seized for the purpose of being impounded under the authority of this Act, from the pound or place where the same shall be so impounded, or shall pull down, damage, or destroy the same pound or place, or any part thereof, or any lock or bolt belonging thereto, or with which the same shall be fastened, or shall rescue or release, or attempt to rescue or release any distress or levy which shall be made under the authority of this Act, until or before such cow, horse, ass, swine, or other live stock or cattle seized or so impounded, or such distress or levy so made, shall be discharged by due course of law, every person so offending shall, upon conviction thereof before any one of his Majesty's justices

(a) See ante, p. 25.

of the peace for the county or place where the offence shall have been committed, either upon confession of the party or parties offending, or upon the oath of one credible witness, and which oath the said justice is hereby authorized and empowered to administer, be committed by such justice, by warrant under his hand and seal, to the common gaol or house of correction of such of the said counties wherein the said offence shall have been committed, there to remain without bail or mainprize for any time not exceeding three calendar months.

General penalty on persons resisting the execution of the Act.—By Stat. 3 Geo. 4. c. 126. s. 139, In case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this Act, or any particular Act made for amending any turnpike road ;—or shall assault any surveyor, or any collector or collectors of the tolls in the execution of his or their office or offices ;—or shall pass through any turnpike gate or gates, rail or rails, chain or chains, or other fence or fences set up or to be set up by authority of Parliament, without paying the toll appointed to be paid at such gate or other fence, or shall hinder (a) or make any rescue of cattle or other goods distrained by virtue of this Act,—every such person offending therein shall, for every such offence, forfeit any sum not exceeding £10, at the discretion of the justice or justices of the peace before whom he or she shall be convicted. .

SECONDLY : *As to the removal of nuisances and annoyances, and the punishment of the offenders, under the Turnpike Acts.*

Surveyor to remove annoyances, &c.—By Stat. 3 G. 4. c. 126. s. 114, It shall be lawful for the surveyor of every turnpike road, and such person as he or they shall appoint, to remove and prevent all annoyances on every part of every turnpike road, by filth, dung, ashes, rubbish, or any other matter or thing whatsoever, being laid or thrown upon any turnpike road, or upon any open common or waste land within 80 feet of the centre thereof, and to dispose of the same for the benefit of such road, in case the owner thereof shall neglect to remove the same within twelve hours after notice in writing, signed by any two trustees, or the surveyor of such road, given to such owner for that purpose, or in case the owner is not known, then after a like notice affixed for three days on the nearest turnpike gate; and to turn any water-courses, sinks, or drains running into, along, or out of any turnpike road or any part thereof, to the prejudice of the same, and to open, scour, and cleanse any water-courses or ditches adjoining to any turnpike road, and make the same as deep and large as he shall think proper and necessary, in case the owners or occupiers of the adjoining lands shall neglect to open, scour, or cleanse such water-courses or ditches after seven days' notice in writing given for that purpose: And the charges thereof and of removing any annoyances, to be settled by any one or more justices of the peace of the county or place where such part of the turnpike road shall lie, shall be re-imbursed to the said surveyor by such owners or occupiers, and the same shall be recovered in such manner as the penalties and forfeitures

are hereinafter directed to be recovered:—And if after the removal of any of the said annoyances, any person shall again offend in the like kind, every such person shall, for every such offence, forfeit and pay any sum not exceeding £5.

As to indictment for non-repair.—It has been decided, that if a turnpike road be out of repair, the trustees are not liable by way of indictment, and that the only persons who are so liable are the inhabitants of the parish or other district in which the road is situated (a). The learned Editor of *Burn's Justice* says, "This has been complained of as a defect in the system, and a considerable hardship on the parishioners, and with some reason. The superintendence of the road and of the repairs of it is taken from them and transferred to the trustees, to whom powers are given to raise, by the collection of tolls, funds over which the parish have no check or controul. In case of misapplication or of improper or wasteful expenditure they have no power of calling for an account; and although the inhabitants may see the road going to decay, their remedies to compel the trustees to do their duty are doubtful, if indeed any exist. The parishioners, as a body, have no fund on which the expences of proceedings against trustees can be charged, and are, in the case of indicting turnpike roads, made criminally responsible for the neglect of others, without any means of preventing the mischief."

But with submission, it may be doubted whether any hardship at all exists in this case, or any responsibility is incurred for that which the parish have no means of

(a) See *Rex v. The Inhabitants of Netherthong*, 2 B. & A. 179, and ante, p. 76.

preventing. It must be remembered that by the common law the parish are bound to repair the whole of the highways lying within their limits, and that when a toll is levied upon the people at large, whereby the expences of maintaining the road are defrayed, the parish are relieved from an existing burthen; and consequently if the repair of the way is again thrown upon the parish, they incur no greater responsibility, than that to which they were before liable. Nor can it be said that the parish have no power to prevent the neglect for which they may be subjected to an indictment. There is no enactment in the Turnpike Acts to deprive the parish of their legal privileges, or to forbid their interference to amend the road for the purpose of avoiding prosecution.

In *Rex v. Netherthong* (a), Mr. Justice Bayley observes, that the provisions of the Turnpike Acts are merely *accumulative*. It follows, then, that it is still incumbent upon the parish to see that the turnpike roads within its limits are kept in repair, and that they are bound and empowered to put any that may be in decay into proper order. It is another question, whether the trustees should be made accountable for the funds which they may have to administer. But the notoriety which is required by the Turnpike Acts to be given to the accounts of the treasurer and surveyor, and the other provisions already in force appear, in practice at least, to afford a sufficient guard against any malversation on the part of the trustees.

However, in favor of the parish, the following provision is made for the apportionment between the parish and the trustees of any fine upon an indictment of a turnpike road.

(a) 2 B. & A. 184.

By *Stat. 3 Geo. 4. c. 126. s. 110*, When the inhabitants of any parish, township, or place, shall be indicted or presented for not repairing any highway being turnpike road, and *the Court before whom such indictment or presentment shall be preferred* shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges attending the same, between the inhabitants of such parish, township, or place, and the trustees of such turnpike road, in such manner as to the said Court, upon consideration of the circumstances of the case shall seem just:—And it shall be lawful for such Court to order the treasurer of such turnpike road to pay the sum so proportioned for such turnpike road out of the money then in his hands or next to be received by him, in case it shall appear to such Court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the securities of the creditors who have advanced their money upon the credit of the tolls to be raised thereupon; which order shall be binding upon such treasurer, and he is hereby authorized and required to obey the same.

It has been decided to be the true construction of this section, that the Court which imposes the fine shall have the power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes, and afterwards removed into the Court of K. B. by *certiorari*, it was held that the Court of K. B. might apportion the fine (a).

Apprehension of transient offenders.—By *Stat. 3 Geo. 4. c. 126. s. 140*, After reciting that offences may be committed against this Act, or other Acts for repairing and

(a) *Rex v. The Inhabitants of Upper Papworth*, 2 East, 413.

maintaining turnpike roads, by persons unknown to the collectors or other officers, It is enacted, That it shall be lawful for any of the trustees of any turnpike road, or their clerk or clerks, or their collectors, surveyors, or other officers respectively, and such other person or persons as he or they shall call to his or their assistance, without any warrant or other authority than this Act, to seize and detain any unknown person or persons who shall commit any such offence or offences, and take him, her, or them before any justice of the peace for the county, district, or place near to the place where the offence or offences shall be committed, or such offender or offenders shall be seized and apprehended; and such justice and justices shall and is and are hereby required to proceed and act with respect to such offender or offenders according to the provisions of this or any other Acts for repairing turnpike roads.

Trustees may direct prosecutions, &c.—By Stat. 3 G. 4. c. 126. s. 133, The trustees of any turnpike road, at a public meeting, may and they are hereby empowered, if they think fit, to direct prosecutions by indictment or otherwise against the offender or offenders for any nuisance or other offence done, committed, or continued in or upon any of the turnpike roads under their care respectively, or to recover any penalty or forfeiture incurred under the provisions of this or any other Turnpike Act, at the expence of the revenues belonging to such turnpike roads, to be allowed by such trustees at some subsequent meeting.

Property to be laid in the trustees generally.—By Stat. 7 Geo. 4. c. 64. s. 17, With respect to property under turnpike trusts, It is enacted, That in any indictment or information for any felony or misdemeanor committed on

or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any Act of Parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners.

The above clause, it will be observed, extends only to indictments and informations. And therefore in *actions* the property must be stated to be in the clerk to the trustees, under the *Stat. 3 Geo. 4. c. 126. s. 60 (a)*. It is said to be highly doubtful whether the word *information*, in the above section, extends to informations in cases of summary convictions under *Section 119, of Stat. 3 Geo. 4. c. 126*, because in *Davies, q. t. v. Birt and others (b)* it was held, that under the terms of the *Stat. 48 Geo. 3. c. 58*, which regarded "every person charged with any offence for which he may be prosecuted by indictment or *information* in the Court of King's Bench, not being treason or felony," an information by a common informer for a penalty was not included (*c*). The cases, however, are not parallel, and many reasons may be urged in favor of the enlarged construction of the word in the above clause, which could not apply to *Stat. 48 Geo. 3. c. 58*.

It is decided, in the case of *Rex v. Camfield (d)*, that if the lessee of turnpike tolls employ a person to collect

(a) Ante, p. 214.

page 34, 2d edition.

(b) 5 Dow. & Ry. 353.

(d) Ry. & Mo. C. C. R. 42.

(c) See Carrington Crim. Law,

them, and allow that person to live in the toll-house rent-free, the property of the house, in an indictment for burglary, may be laid in the person so employed by the lessee; because he has the exclusive possession, the house not being parcel of any premises his master occupied.

Justices may proceed by summons in the recovery of penalties.—By *Stat. 4 Geo. 4. c. 95. s. 83*, In all cases in which by the said recited Act (a) any penalty or forfeiture, by that or any other Act or Acts for making or maintaining any turnpike road imposed, is made recoverable by information before a justice of the peace, it shall be lawful for any justice of the peace to whom complaint shall be made of any offence against any such Act, or the said recited Act or this Act, to summon the party complained against before him, and on such summons to hear and determine the matter of such complaint, and on proof of the offence to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed to recover the same, although no information in writing shall have been exhibited or taken by or before such justice:—And all such proceedings by summons without information shall be as good, valid, and effectual to all intents and purposes, as if an information in writing was exhibited.

Recovery and application of penalties.—By *Statute 3 Geo. 4. c. 126. s. 141*, All penalties, forfeitures, and fines by this Act inflicted or authorized to be imposed, (the manner of levying and recovering and applying whereof is not herein otherwise directed,) shall upon proof and conviction of the offences respectively, before

(a) 3 Geo. 4. c. 126.

any justice of the peace for the county, riding, or place; where the offence shall have been committed (as the case may require), either by the confession of the party offending, or by the oath of any credible witness or witnesses (which oath such justice is in every such case hereby fully authorized to administer), be levied, together with the costs attending the information and conviction, by distress and sale of the goods and chattels of the party or parties offending, by warrant under the hand and seal of such justice (which warrant such justice is hereby empowered and required to grant), and the overplus (if any) after such penalties, forfeitures, and fines, and the charges of such distress and sale are deducted, shall be returned upon demand unto the owner or owners of such goods and chattels:—And in case such fines, penalties, and forfeitures shall not be forthwith paid upon conviction, then it shall be lawful for such justice to order the offender or offenders so convicted to be detained and kept in safe custody (a) until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security, to the satisfaction of such justice, for his or their appearance before such justice, on such day or days as shall be appointed for the return of such warrant of distress, such day or days not being more than seven days from the time of taking any such security, and which security the said justice is hereby empowered to take, by way of recognizance or otherwise: But if upon the return of such warrant, it shall appear that no sufficient distress can be had thereupon, then it shall be lawful for any such justice of the peace, and he is hereby authorized and required, by warrant or warrants

(a) In the case of *Still v. Walls and Harris*, 7 East, 533, it was held, that such an order to detain

in custody until the return of the warrant of distress may be by parol.

under his hand and seal, to cause such offender or offenders to be committed to the common gaol or house of correction of the county, riding, or place, where the offender shall be or reside, there to remain, without bail or mainprize, for any time not exceeding three calendar months, unless such penalties, forfeitures, and fines, and all reasonable charges attending the same, shall be sooner paid and satisfied:—And the monies arising by such penalties, forfeitures, and fines respectively, when paid or levied, if not otherwise directed to be applied by this Act, shall be from time to time paid, one moiety thereof to the informer or person suing for and recovering the same, and the other moiety to the treasurer or treasurers to the trustees for repairing and maintaining the road on which such offence shall have been committed, and applied and disposed of for the purposes of such road and of this Act (a).

Recovery of damages, in addition to the penalties.—By Stat. 4 Geo. 4. c. 95. s. 69, It is enacted, That where by Stat. 3 Geo. 4. c. 126, or any Act for making or maintaining any turnpike road, any damages or charges are directed or authorized to be paid or recovered, in addition to any penalty or penalties for any offence or offences, the amount of such damages or charges, in case of dispute respecting the same, shall be settled, ascertained, and determined by the justice or justices of the peace by or before whom any offender shall be convicted of any such offence or offences, who is hereby authorized and required, on non-payment thereof, to levy such damages or charges by distress and sale of the offender's

(a) See Forms, Appendix, No. LXXX. to No. LXXXV. inclusive.

goods and chattels, in manner directed by *Stat. 3 Geo. 4. c. 126*, for the levying of any penalties or forfeitures.

Mode of recovery to be pursued by prosecutors.—By *Stat. 3 Geo. 4. c. 126. s. 143*, Every prosecutor or informer shall sue for and recover any forfeiture or penalty imposed by this or any other Act or Acts of Parliament made for erecting turnpikes, or for repairing and amending turnpike roads, in the manner hereinafter mentioned; (that is to say), if the same shall exceed the sum of £20 or upwards, it shall be recoverable by action of debt in any of his Majesty's Courts of Record, in which it shall be sufficient to declare that the defendant is indebted to the plaintiff in the sum of £— being forfeited by an Act passed in the third year of the reign of his Majesty King George the Fourth, intituled, 'An Act' [*here set forth the title of this Act (a), if the offence shall be committed under it, or, 'An Act,' &c. setting out the title of the Act under which the penalty shall be claimed*]; and the plaintiff, if he recover in any such action, shall have full costs:—Provided (*b*) that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previous to the commencement of such action, and that the same be brought and commenced within three ca-

(*a*) "An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England."

(*b*) This proviso, in the printed Statute, forms part of the preceding sentence relating to costs. It must have been so placed by mistake, and it has led to the supposition, that if the terms of the proviso are not complied with, the

prosecutor will only be barred of his costs, and not of his action.—However, in the case of *Towney v. White*, 5 B. & C. 125, where the plaintiff had neglected to give the requisite notice, the Court of K. B. held, that he was barred of his action. The punctuation of the clause, therefore, should be as it is given in the text.

lendar months after the offence for which such action is brought shall have been committed:—And if such penalty or forfeiture shall not exceed the sum of £20, and shall be more than £5, the same shall be recoverable only by information before a justice of the peace, subject to appeal in manner hereinafter mentioned:—And if such penalty or forfeiture shall not exceed the sum of £5, the same shall in like manner be recoverable only by information before a justice of the peace, and no writ of *certiorari* to remove the same shall be allowed.

Party aggrieved may recover for special damage.—By Section 144, Where any distress shall be made for any sum or sums of money to be levied by virtue of this Act, or any other Act for repairing, amending, or maintaining any turnpike road, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers on account of any default or want of form in any proceeding relating thereto; nor shall the party or parties distraining be deemed a trespasser or trespassers *ab initio*, on account of any irregularity which shall be afterwards done in making the distress; but the person or persons aggrieved by such irregularity may recover the satisfaction for the special damage in an action on the case:— Provided always, that no plaintiff shall recover in any action for such irregularity, trespass, or wrongful proceedings, if tender of sufficient amends shall be made by or on behalf of the party who shall have committed or caused to be committed any such irregularity or wrongful proceedings, before such action brought; and in case no such tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he shall see fit; whereupon such

proceedings, or orders and judgment, shall be had, made, and given in and by such Court as in other actions where the defendant is allowed to pay money into Court.

As to the evidence and competency of witnesses.—By *Stat. 3 Geo. 4. c. 126. s. 137*, It is enacted, That no conviction shall be had or made by virtue of this Act, unless upon the view of a justice convicting, or on confession of the party accused, or upon oath of one or more credible witness or witnesses; and any inhabitant of any parish, township, or place in which any offence shall be committed contrary to this Act, shall not be deemed an incompetent witness by reason of his or her being an inhabitant of such parish, township, or place: And any justice of the peace may act in the execution of this Act, notwithstanding he may be a creditor, or a trustee or commissioner for making, repairing, and maintaining the roads on which any offence contrary to this Act shall be committed.

And by *Stat. 4 Geo. 4. c. 95. s. 84*, No person shall be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any Court of law or equity, or before any justice or justices of the peace under or by virtue of any Act for making or maintaining any turnpike road, or the said recited Act (a) or this Act, by reason of being a trustee or commissioner of such road, or a mortgagee or creditor of the tolls thereof, or a farmer, lessee, or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such Act; nor shall such testimony or evidence, for any of the reasons aforesaid, be rejected or liable to be questioned or set aside.

(a) 3 Geo. 4. c. 126.

Penalty to enforce attendance of witnesses.—By Stat. 3 Geo. 4. c. 126. s. 138, If any person or persons, after having been paid or tendered a reasonable sum of money for his, her, or their costs, charges, or expences, shall be summoned as a witness or witnesses to give evidence before any justices (a) of the peace, touching any matter of fact contained in any information or complaint for any offence against any Act of Parliament relating to turnpike roads or this Act, either on the part of the prosecutor or the person or persons accused, (b) shall refuse or neglect to appear at the time and place for that purpose appointed, without a reasonable excuse for his, her, or their refusal or neglect, or appearing shall (after having been paid or tendered a reasonable sum for his costs, charges, and expences) refuse to be examined upon oath and give evidence before such justice of the peace, then and in either of such cases such person shall forfeit for every such offence any sum not exceeding 40s.

Limitation and trial of actions, &c.—By Stat. 3 Geo. 4. c. 126. s. 147, If any action or suit shall be commenced against any person or persons for any thing done in pursuance of this Act (c), then and in every such case such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought in the county or place where the cause of action shall have arisen, and not elsewhere; and the defendant in every such action or suit shall and may plead the general issue, and at the trial thereof give this Act and the special matter in evidence; and if the matter or thing complained of shall

(a) Sic.

(b) Sic.

(c) See *Bazing v. Skelton*, 5 T.

R. 16. and *Waterhouse v. Keen*,
4 B. & C. 200..

appear to have been done under the authority and in the execution of this Act, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought and laid in any other county or place than as aforementioned, then the jury shall find for the defendant; and if the plaintiff shall become nonsuit, or discontinue his or her action after the defendant shall have appeared, or have a verdict against him or her, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall and may recover treble costs, and have the like remedy for recovery thereof as any defendant hath in any cases by law.

And by *Stat. 9 Geo. 4. c. 77. s. 18*, No person or persons shall or may be convicted of any offence or offences contrary to the provisions of this Act, or of the said recited Acts (*a*), or of any local Turnpike Act, in a summary way before any justice or justices of the peace, after the expiration of six months from the time when any such offence or offences shall or may have been committed.

Appeal to the Quarter Sessions.—By *Stat. 4 Geo. 4. c. 95. s. 87*, If any person shall think himself or herself aggrieved by any order, judgment, or determination made, or by any matter or thing done by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road in pursuance of this Act, or the said recited Act (*b*), or any local Act for making, repairing, or maintaining any turnpike road, (except where the order, judgment, or determination of any such justice or justices, trustees or commissioners, are hereby declared to be final and conclusive, and except under the particular circumstances

(*a*) 3 Geo. 4. c. 126—4 Geo. 4. c. 95—and 7 & 8 Geo. 4. c. 24. (*b*) 3 Geo. 4. c. 126.

hereinafter mentioned,) and for which no particular method of relief hath been already appointed, such person may appeal to the justices of the peace at the next General or Quarter Sessions of the peace to be held for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to such justice, commissioner, or trustee, by whose act or acts such person shall think himself or herself aggrieved, notice in writing^(a) of his or her intention to bring such appeal, and of the matter thereof, within six days after the causes of such complaint shall arise, and within four days after such notice entering into recognizances before some justice of the peace, with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such General or Quarter Sessions, and also to pay the penalty or forfeiture in case the conviction should be affirmed:—And each and every justice of the peace, commissioner, or trustee having received notice of such appeal as aforesaid, shall return all proceedings whatever had before him respectively, touching the matter of such appeal to the said justices at their General or Quarter Sessions aforesaid:—And the said justices at such Sessions, upon due proof of such notice having been given as aforesaid, and of such recognizance having been entered into in manner before directed, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they the said justices shall think proper, to be levied and recovered by distress and sale of the goods and chattels of the person or persons against whom such determination shall be made; and

(a) See Form, Appendix, No. LXXXVI.

the determination of such General or Quarter Sessions shall be final and conclusive to all intents and purposes: Provided, that in case there shall not be time to give such notice, and enter into such recognizances as aforesaid, before the next Sessions to be holden after the conviction of the appellant, then and in every such case, such appeal may be made to the next following Sessions, and shall be there heard and determined:—Provided always, that no appeal shall be allowed against any conviction for any penalty or forfeiture which shall not exceed the sum of 40s.

Proceedings not to be removed by certiorari.—By the above Section 87, No proceeding to be had or taken in pursuance of this Act shall be quashed or vacated for want of form, or removed by *certiorari*, or any other writ or process whatsoever, into any of his Majesty's Courts of Record at Westminster; any law or statute to the contrary notwithstanding.

Forms of proceedings.—By Statute 3 Geo. 4. c. 126, s. 148(a), the forms contained in the Schedule may be used upon all occasions.

Power to administer oaths.—By Stat. 3 Geo. 4. c. 126, s. 146(b), Justices of the peace and trustees are empowered to administer an oath or affirmation, according to their several jurisdictions.

(a) See ante, p. 323.

(b) See ante, p. 321.

APPENDIX OF FORMS.

PART I.

FORMS RELATING TO HIGHWAYS IN GENERAL.

BY *Stat.* 13 Geo. 3. c. 78. s. 69 (a), the forms set forth in the Schedule are directed to be used on all occasions; and a material variance is fatal. In this Appendix, therefore, the forms which are taken from the Statute Book have their derivation marked, for guidance in practice.

No. I. *Information in order to obtain an apportionment of a highway.—From Schedule to Stat. 34 Geo. 3. c. 64.—Vide ante, p. 85.*

County of } At a Petty Session holden before J. P. and
 _____ } K. P. two of his Majesty's justices of the
 peace for the said county, this — day of —, J. S.
 one of the surveyors of the highways of the parish of A.
 came before the justices aforesaid, and gave them to be
 informed, that there is in the said county a certain com-
 mon highway leading from M. to N.; and that there is
 a certain part of the said highway, that is to say, so
 much thereof as lies between a certain place called C.
 and a certain other place called D., being in length —
 [as the case may be], one side of which last-mentioned
 part of the said highway adjoining to the parish of A.,
 lies within the said parish of A. and is to be, and of right
 ought to be, repaired by the said parish of A.; and that

the other side of the same part of the said highway, adjoining to the parish of B., lies within the parish of B., and is to be, and of right ought to be, repaired by the said parish of B.; and stating that the repair of such part of the said highway is very inconvenient to the parishes aforesaid, and the want thereof detrimental to the public; and therefore praying, that such part of the said highway may be allotted and apportioned for the repair thereof, by the justices aforesaid, to the said several parishes of A. and B. in the manner directed by an Act passed in the thirty-fourth year of the reign of King George the Third, intituled, "An Act," &c.

(Signed) J. S.

one of the surveyors of the highways
for the parish of A.

The above application was
made to us the day and
year first above-written,

J. P.
K. P.

No. II. *Summons to be subjoined to a copy of the above information.—From Schedule to Statute 34 Geo. 3. c. 64.—Vide ante, p. 86.*

County of } To the surveyors of the highways of the
——— } parish of B., in the said county, any or
either of them.

Whereas a certain information has been given to us, J. P. and K. P. two of his Majesty's justices of the peace for the said county, by J. S. one of the surveyors of the highways of the parish of A., in the said county, a true copy whereof is above written: These are, in his Majesty's name, to summon you, any or either of you, to appear before us at —, in the said county, on the — day of —, at —, to shew cause (if any) why an allotment and apportionment of the highway therein mentioned should not be made, according to the provisions of the Act referred to in the said information. Hereof fail not. Given under our hands, this — day of —.

J. P.
K. P.

No. III. *Final order and adjudication, to be filed with the clerk of the peace.—From Schedule to Stat. 34 Geo. 3. c. 64.—Vide ante, p. 86.*

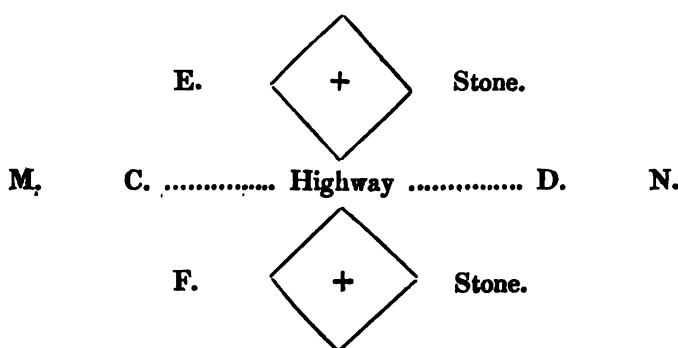
Whereas, &c. [*here state the original application; the summons; the appearance, and that the parties were heard; or their non-appearance.*] Now, we the justices aforesaid, having fully heard and understood the premises, do declare, adjudge, and order, that the said highway shall be divided in the following manner; (that is to say), that at the distance of —, measuring from the place called C., there shall be erected certain posts or stones, E. and F., on each side of the said highway; and the whole of the said highway, from the place called C. to such posts or stones, shall be from time to time and at all times hereafter, repaired by the parish of A.; and the whole of the said highway from such posts or stones to the place called D., shall from time to time and at all times hereafter, be repaired by the parish of B. In witness whereof, we have hereunto set our hands and seals, this — day of —.

J. P. (L. S.)
K. P. (L. S.)

PLAN.

Parish of A.

Bound to repair on this side to the dotted line.



Parish of B.

Bound to repair on this side to the dotted line.

No. IV. *Warrant for calling the meeting of householders, &c. and for fixing that of the justices for appointing surveyors.—From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, pp. 105. 107.*

Middlesex. { To the constables, headboroughs, and tithing-men, within the [*hundred, riding, division, liberty, or precinct,*] (*as the case shall be,*) of —, in the said county.

In order to carry into execution an Act made in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the public highways," you are hereby severally required forthwith to give public notice to the churchwardens, surveyors of the highways, and householders, being assessed to any parochial or public rate within your respective liberties, that they do assemble on the 22d day of September next, at the church or chapel, or if there shall be no church or chapel, then at the usual place of public meetings within their respective liberties, at the hour of eleven in the forenoon; and that the major part of them so assembled, do make a list of the names of at least ten persons living therein, who each of them have an estate in lands, tenements, or hereditaments, lying within the same, in their own right, or in right of their wives, of the value of £10 by the year; or a personal estate of the value of £100; or are occupiers or tenants of houses, lands, tenements, or hereditaments, of the yearly value of £30. And if there shall not be ten persons having such qualifications, then that they do insert in such list, the names of so many of such persons as are so qualified, together with the names of the most sufficient and able inhabitants not so qualified, as shall make up the number ten, if so many can be found, if not, so many as shall be there resident, to serve the office of surveyor of the highways: And you are also severally required within three days after making the said list, to deliver a copy thereof to one of the justices of the peace of the said [*hundred, riding, division,*] (*&c. as the case shall be,*) living in or near the same [*parish, &c.*] and also to give personal notice to, or cause notices in writing to be left at the places of abode of the several persons contained in such list, informing them of their

being so named, to the intent that they may severally appear before the said justices at their Special Sessions to be holden at —, within the said [*hundred, &c.*] on the — day of —, now next ensuing, at the hour of — in the forenoon of the same day, to accept such office, if they shall be appointed thereto, or to show cause, if they have any, against their being appointed; and you are likewise to give notice to the present surveyors of the highways within your respective liberties, to appear at the same time and place, and produce such accounts and lists before the said justices as are required by the said Act; and you and each of you are personally to appear before the said justices, at their said Special Sessions, and then and there severally deliver to the said justices the said original list or lists taken within your respective liberties, and give an account of the execution of this our precept. Given under our hands and seals, the — day of —, in the year of our Lord —.

No. V. *List of persons to be returned to the justices.*
From Schedule to Statute 13 Geo. 3. c. 78.—Vide
ante, p. 105.

A list of the several persons named for surveyors of the highways for the [*insert the name of the parish, township, or place,*] at a meeting held at —, in the said [*parish,*] the — day of —.

A. B.

C. D.

[*This is to be added when a particular person is recommended.*]

We whose names are subscribed, being two parts in three of the persons assembled at the meeting aforesaid, do agree in the choice of A. B. as a fit person to serve the office of surveyor for [*insert the parish, &c.*] aforesaid, and in the allowance to him of — for his trouble in executing the same for the year ensuing; and we do recommend the said A. B. to the justices for their appointment accordingly.

No. VI. *Notice to the persons contained in the list.—*
From Schedule to Stat. 13 Geo. 3. c. 78.—See
ante, p. 106.

A. B. Take notice, that you were, at a meeting held at [insert the name of the parish, &c.] on the — day of —, named as one of the persons to be returned to the justices as fit to serve the office of surveyor for the said [parish, &c.] for the year ensuing; and if you have any cause to shew why you should not be appointed to serve such office, you must make the same appear before the justices at their Special Sessions, to be holden at —, on the — day of — next.

A. B. { constable,
 headborough, or
 tithingman,
 [as the case may be.]

No. VII. *Appointment of a surveyor.—From Schedule*
to Stat. 13 Geo. 3. c. 78.—See ante, p. 107.

Middlesex. { At a Special Sessions, held at —, in the
 hundred of —, by justices of the peace
 for the said county, acting within the said
 hundred, on the — day of —, 18—.

We do hereby nominate and appoint A. B. &c. of [insert the name of the parish where he lives,] in the said hundred, surveyor [or surveyors] of the highways within the said [parish, &c.] for the year ensuing [and we do allow the said A. B. the salary of — for his trouble (a)]: And you the said A. B. are faithfully and truly to execute the said office of surveyor, according to the directions of the Statutes passed in the 13th, 34th, 44th, and 54th years of the reign of his late Majesty King George the Third, "For the amendment and preservation of highways," an abstract of the material parts of which Statutes is hereunto annexed. Given under our hands and seals, the day and year above-mentioned.

(a) These words to be inserted only when a surveyor is appointed with a salary.

No. VIII. *Order to the [constable, &c.] to return to the justices the amount of a sixpenny assessment. From Schedule to Stat. 13 Geo. 3. c. 78. — Vide ante, p. 113.*

Middlesex. To the constable, &c. of —.

You are hereby required to return to us, and the other justices to be assembled at the Special Sessions to be held at — for the [*hundred, &c.*] of — in the said county, on the — day of — next, the amount of the last assessment of sixpence in the pound, for the use of the highways within your liberty, if any such has been raised; if not, what you apprehend, from the best information you can get, an equal assessment of sixpence in the pound upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments within the said liberty, according to their yearly value, will amount to. Given under our hands, this — day of —, 18—.

No. IX. *Return to the justices of the amount of a sixpenny assessment.—From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, p. 113.*

To the justices assembled at their Special Sessions at —, the — day of —.

In obedience to your order, I do return and certify, That the last assessment of sixpence in the pound, for the use of the highways within the liberty of —, amounted to the sum of —.

[*If no assessment of sixpence in the pound hath been made, then as under.*]

In obedience to your order, I do return and certify, That no assessment hath been made of sixpence in the pound for the use of the highways within the liberty of —; but I apprehend, from the best information which I have been able to get, that an equal assessment of sixpence in the pound, upon all occupiers of lands, tenements, woods, tithes, and hereditaments within the said liberty, will amount to the sum of —.

A. B. [constable, &c.]

No. X. *Appointment of an assistant surveyor.—From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, p. 114.*

Middlesex. { At a Special Sessions, held at —, in the
hundred of —, by justices of the peace
for the said county, acting within the
said hundred, on the — day of —.

We do hereby nominate and appoint C. D., a substantial inhabitant of the [*parish, &c.*] of —, in the said hundred, assistant to A. B. whom we have appointed surveyor of the highways of the said [*parish, &c.*]; and you the said C. D. are, to the best of your skill and judgment, to assist the said surveyor whenever requested by him, in calling in and attending the performance of the statute duty, in collecting the compositions, fines, penalties, and forfeitures, and in making and collecting the assessments, and in making out and serving the notices authorized by the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of highways," and in such other matters and things as shall be reasonably required of you by the said surveyor, in the execution of his office of surveyor, pursuant to the said Act; and you are justly and truly to account with, and pay to the said surveyor or his order, the money which shall come to your hands by the means aforesaid. Given under our hands and seals, the day and year above-mentioned.

No. XI. *Bond from surveyor.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 115.*

We, A. B. surveyor of the highways for the [*parish, township, &c.*] of —, and C. D. of —, are bound to E. F. of — aforesaid, in the sum of — pounds, to be paid to the said E. F. his executors, administrators, or assigns; for which payment we hereby bind ourselves severally, and each of our heirs, executors, and administrators. Dated the — day of —, 18—.

The condition of this bond is such, that if the said A. B., his executors or administrators, shall duly and faithfully

account for, apply, and pay all and every the sum and sums of money which shall come to his hands as surveyor of the highways for the [*parish, &c.*] according to the directions and true intent and meaning of the Statute made in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," then this bond to be void, or else to remain in full force.

No. XII. *Oath to be administered to the surveyor, upon passing his accounts.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 120.*

I, A. B. do swear, that the accounts now produced and delivered by me, as surveyor of the highways for the [*parish, &c.*] of —, for the last year, are just and true to the best of my knowledge.

So help me God.

No. XIII. *Allowance of accounts.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 120.*

These accounts were examined and allowed before —.

No. XIV. *Conviction on Stat. 13 Geo. 3. c. 78, s. 48, of a surveyor of highways, for not delivering over his books of account to the churchwardens and overseers.—Vide ante, p. 121.*

County of } Be it remembered, that on the — day
 — } of —, in the year of our Lord —, at
 —, in the county of —, J. S. came before me W. H.
 one of his Majesty's justices of the peace in the said
 county, and informed me that W. B. of the hamlet or
 division of B. in the township of C. in the said county,
 labourer, was surveyor of the highways within the said
 hamlet, for the year ending at Michaelmas last past, and
 that afterwards, to wit, on the — day of — now last
 past, at O. in the county aforesaid, a certain book of
 accounts of the said W. B. as such surveyor, and certain
 assessments for repairs of the said highways, were settled

and allowed by J. H. clerk, and J. W. esquire, two of his Majesty's justices of the peace in and for the said county, pursuant to the Statute in such case made and provided; and that afterwards, to wit, from thenceforth to the time of exhibiting the said information and complaint, there was a churchwarden and overseers of the poor, duly appointed in and for the township of C. aforesaid, including the said hamlet or division, and that the said W. B. during all the time last aforesaid, neglected to transmit and deliver to such churchwarden and overseers, or any or either of them, the said book and assessments so settled and allowed as aforesaid, contrary to the form of the Statute in such case made and provided: Whereupon the said W. B., after being duly summoned to answer the said charge, appeared [*here conclude as in No. LVIII. which is taken from the Schedule to Statute 13 Geo. 3. c. 78.*]

No. XV. *Notice to perform statute duty (to be given four days before the day on which the duty is to be performed.)—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 129.*

A. B. You are hereby required to send a team, with two able men (a), to —, within the [*parish, &c.*] of —, on the — and — days of — next, at — o'clock in the morning of each day, in order to perform such duty upon the highways within the said —, as shall be required by the surveyor, pursuant to the direction of the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways." [*When personal labour is required, You are hereby required by yourself, or a sufficient labourer, to attend, &c. &c.*] Dated this — day of —, 18—.

(a) If he does not occupy lands, &c. of the yearly value of £30 in such parish, he is only to send one

man.—If a waggon or a cart with two horses or one horse only is required, let it be expressed.

No. XVI. *Order for statute duty to be performed in kind.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 131.*

Middlesex. { At a Special Sessions held at —, in the
[*hundred*] of —, in the said county,
the — day of —, by justices of the
peace for the said county, acting within
the said [*hundred*].

It appearing to us from the information which we have received, that there will be difficulty in procuring the necessary carriage [*or, a sufficient number of labourers, as the case shall be,*] for the repair of the highways within the [*parish, &c.*] of —, within the said [*hundred*], without paying high and extravagant prices for the same, we do hereby order and direct the team-duty within the said [*parish, &c.*] except such teams where the owners thereof do not occupy lands, tenements, woods, tithes, or hereditaments within the said [*parish, &c.*] of the annual value of £30, [*or, one half of the team-duty, &c.*] [*or, the labourers liable to perform statute duty within the said [*parish, &c.*] as the case shall be,*] to perform statute duty in kind within the said [*parish, &c.*] according to the authority and directions of the Act passed in the 13th year of the reign of his Majesty King George the Third, “For the amendment and preservation of the highways.”

No. XVII. *Notice to the surveyor of the times fixed by the inhabitants for being excused from doing their statute duty.—From Sched. to Stat. 13 Geo. 3. c. 178.—Vide ante, p. 137.*

To the surveyor of the highways for the [*parish, &c.*]
of —, in the county of —.

I, A. B. constable [*headborough, tithingman*] of the said [*parish, &c.*] do hereby give you notice, that the inhabitants of the said [*parish, &c.*] did, at a vestry or public meeting held on the — day of —, 18—, agree to take the benefit of the indulgence of three months for

not performing their statute duty given by the Legislature in the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways" at the times following; *videlicet*, That they shall not be called upon to perform such duty between the — day of — and the — day of — (which they consider as the seed month), nor between the — day of — and the — day of — (which they consider as the hay-harvest month), nor between the — day of — and the — day of — (which they consider as the corn-harvest month.) [*The like notice to be given to the surveyor or surveyors of the turnpike roads, where there are any such within the parish, &c.*]

No. XVIII. *Information of a surveyor of highways, for the purpose of obtaining an order for a composition instead of statute duty in kind, pursuant to Statute 54 Geo. 3. c. 109. s. 4. — Vide ante, p. 139.*

County of } Be it remembered, that on the — day
 — of —, in the year of our Lord —, at a
 Special Sessions held at —, in the hundred of —, in
 the said county, by justices of the peace for the said
 county, acting within the said hundred: —, surveyor
 of the highways within the parish of —, in the said
 hundred of —, and county aforesaid, maketh oath, that
 the maintenance and repairs of the highways lying within
 the said parish, can be more effectually carried on by a
 composition in money, than by a performance of the
 statute duty, from the several persons who are bound by
 law to perform statute duty on the highways within the
 said parish: Wherefore the said surveyor prayeth the
 consideration and order of us the said justices in the
 premises, according to the form of the Statute in such
 case made and provided.

Exhibited before us, on
 oath, the day and year
 above written.

— { surveyor of
 { the highways.

- No. XIX. *Order of two justices, to enable surveyors to receive a composition in money instead of performance of statute duty in kind, pursuant to Stat. 54 Geo. 3. c. 109. s. 4.—Vide ante, p. 139.*

County of { At a Special Sessions held at —, in the
 — hundred of —, in the said county, the
 — day of —, in the year —, by
 justices of the peace for the said county,
 acting within the said hundred.

Whereas it hath been made appear unto us, J. P. and K. P. esquires, two of his Majesty's justices of the peace for the said county, acting within the said hundred, upon the oath of A. S. surveyor of the highways [*or, turnpike road, or, roads, as the case may be,*] within the parish [*or, township*] of —, within the said hundred and county, that the maintenance and repairs of the said highways, [*or, turnpike road, or, roads*] lying within the said parish [*or, township,*] can be more effectually carried on by a composition in money, than by a performance of the statute duty, from the several persons who are bound by law to perform statute duty on the highways [*or, turnpike road, or roads*] within the said parish [*or, township*]: We do hereby authorize the said A. S. [*or A. S. and B. S.*] the surveyor [*or, surveyors*] of the highways [*or, turnpike road, or, roads*] within the said parish [*or, township,*] to require and receive from the several persons who are bound by law to perform such statute duty, the whole [*or, one-third, or, two-thirds, as occasion may require,*] of the composition in money, in lieu of the statute duty which they are bound to perform on the highways [*or, turnpike road, or, roads*] within the said parish [*or, township*] of —, according to the authority and directions of the Act passed in the 54th year of the reign of his late Majesty King George the Third, intituled, "An Act to amend an Act of the 13th year of his present Majesty, to explain, amend, and reduce into one Act, the Statutes now in force for the amendment and preservation of the public highways within England, and for other purposes." Given under our hands and seals, this — day of —, in the year of our Lord —.

J. P. (L. S.)
 K. P. (L. S.)

No. XX. *Justices' notice to surveyor to shew cause why a poor labourer should not be discharged from highway rates or composition, under Statute 34 Geo. 3. c. 74. s. 5.—Vide ante, p. 147.*

———— } To Mr. A. B., surveyor of the highways with-
to wit. } in the parish of —, in the said county.

Whereas E. F. of —, in your parish, labourer, hath this day made complaint on oath to us, two of his Majesty's justices of the peace in and for the said county, in Petty Sessions assembled, that he wholly gains his livelihood by daily labour, and that by reason of his numerous family, he is in very poor and indigent circumstances, and utterly unable to pay or contribute towards any rates, assessments, or compositions for or in respect of any highways within the said parish, and hath prayed of us the said justices, that he may be exempted from paying the same: We, the said justices, do therefore hereby give you notice to appear before us at —, in the said county, on Thursday, the — day of —, at our Petty Sessions, to be then and there held, to shew cause why the said E. F. should not by us be adjudged to be exempted from the payment of such rates, assessments, or compositions accordingly. Given under our hands and seals, &c.

No. XXI, *Notice for compositions.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 148.*

Notice is hereby given, that all persons who are inclined to compound for their statute duty within the [*parish, &c.*] of —, are hereby required to signify their intention to compound for the same to —, the surveyor of the highways for the said [*parish, &c.*] at the house of —, of —, on the — day of this instant November, between the hours of — and —; and they are hereby required, at the same time, or within the space of one month after, to pay their composition-money to the said surveyor; And also that all persons who are liable to pay money for the lands, tenements, woods, tithes, and hereditaments, which they occupy, or in lieu of their duty

within the [*parish, &c.*] according to the Act made in the 13th year of his Majesty King George the Third, "For the amendment and preservation of the highways," are required to pay the same to the said surveyor on the day, or within the time aforesaid. Dated this — day of —, 18—.

A. B. Surveyor.

No. XXII. *Licence from justices of peace at a Special Sessions, to get materials for the repair of the highways in another parish besides that wherein such materials are to be employed.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 152.*

Middlesex. { At a Special Sessions held at —, for the
[*hundred*] of — in the said county, by
justices of the peace for the said county,
acting within the said [*hundred*] on the
— day of —, 18—.

It appearing to us upon evidence this day received, that sufficient materials cannot conveniently be had within the waste lands, common grounds, rivers, or brooks, nor in the inclosed lands or grounds lying within the [*parish*] of A. in the said [*hundred*], for the repair of the highways within the said [*parish, &c.*] nor in the waste lands, common grounds, rivers, or brooks, within the [*parish, &c.*] of B. adjoining to the said [*parish*] of A. We do hereby give our licence to the surveyor for the said [*parish*] of A., to search for, dig, get, and carry sand, gravel, chalk, stone, and other materials, within the inclosed lands or grounds of C. D. within the said [*parish, &c.*] of B. to be employed in the repair of the highways within the said [*parish*] of A.; it appearing from evidence laid before us, that there are proper materials within the said lands for the purposes aforesaid, lying convenient to the said highways; and that after such materials shall be so taken, there will be sufficient left for the use of the highways within the said [*parish*] of B.; upon the said surveyor making satisfaction and recompence for the same, in the manner directed by the Act passed in the 13th year of the reign of his Majesty King George the Third, "For

the amendment and preservation of the highways," subject to such restrictions as are therein contained. Given under our hands and seals the day and year above written.

A. B.

C. D.

No. XXIII. *Surveyor's application to a justice of peace, for his licence to take stones for repairing the highways from lands being private property, on affidavit that the same are necessary for repair of the highways, and that the occupier, on request, had refused permission.—Vide ante, p. 152.*

Middlesex. { Be it remembered, that on the — day
 { of —, at —, in the said county, A. S.
 surveyor of the highways within the parish of —, in
 the said county, in his proper person, cometh before me
 J. P. esq., one of his Majesty's justices of the peace in
 and for the said county, and maketh complaint on oath
 that he hath applied to A. O. of —, for his consent to
 gather stones from the lands called —, being the free-
 hold of him the said A. O., and now in his actual occu-
 pation within the said parish of —, and county of Mid-
 dlesex, for the purpose of repairing and amending the
 highways with the said parish; and further upon his oath
 the said A. S. giveth me the said justice to understand
 and be informed, that the said stones are necessary ma-
 terials for the repair of the said highways, and that
 proper materials cannot otherwise be procured, and that
 the said A. O. hath refused to permit the same to be
 gathered; wherefore the said A. S. prayeth the consider-
 ation and order of me, the said justice, in the premises,
 according to the form of the Statute in such case made
 and provided.

A. S.

Exhibited before me, on the oath
 of the said A. S., the day and
 year first above written.

J. P.

No. XXIV. *Licence from a justice of peace for a surveyor to gather stones upon inclosed lands for the repair of the highways.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 152.*

Middlesex. { To the surveyor of the highways for the
[*parish*] of —, in the [*hundred*] of
— in the said county.

Whereas, by an Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," the surveyors are authorized to gather stones lying upon any lands or grounds within their liberty, for the use and benefit of the highways, but not without the consent of the occupiers of such lands, or a licence from a justice of peace for that purpose; and whereas it appears to me, E. F. one of his Majesty's justices of the peace for the said county, and acting within the said [*hundred, &c.*] upon the oath of the said surveyor, that he hath applied to A. B. of — for his consent to gather stones from the lands called or known by the names of — and — in his occupation, within the said [*parish, &c.*] for the purposes aforesaid, and that the said stones are necessary for the repair of the said highways, and that the said A. B. hath refused to permit the same to be gathered; and the said A. B. having been duly summoned to appear before me, to show cause why such permission should not be granted, and [having appeared before me accordingly; or having sent his steward or agent, or, C. D. on his behalf, to attend me upon that occasion; or, but not having appeared,] I have heard what has been alleged, and taken the said matter into consideration, and am of opinion, that the said stones are necessary, and ought to be gathered and carried away for the purposes aforesaid: Therefore, I do hereby give my licence to the said surveyor, to take and carry away the same accordingly. Given under my hand and seal, the — day of —, 18—.

No. XXV. *Order at a Special Sessions for an assessment of sixpence in the pound.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 161, 162.*

Middlesex. { At a Special Sessions for the highways, held
 { at —, in the hundred of —, in the
 said county, the — day of —, by justices of peace for the said county, acting within the said hundred.

Upon application made to us by the surveyor of the highways for the [*parish*] of —, and upon evidence given upon oath before us, [That the duty directed to be performed, and the money authorized to be collected and received, by an Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways,"—*and if for the additional assessment, add,* also by an Act passed in the 54th year of the reign of his said Majesty, intituled, "An Act to amend an Act of the 13th year of his present Majesty, for the amendment and preservation of the highways,"—have been fully performed, applied, and expended, according to the directions of the said Act:—*Or,* We are fully satisfied that the common highways, bridges, causeways, streets, and pavements, belonging to the [*parish, &c.*] of —, are so far out of order that they cannot be sufficiently amended and repaired, paved, cleansed, and supported, by the means prescribed by the said Act:] and it appearing to us that notice has been duly given of such intended application, according to the directions of the said Act, we do hereby order, direct, and appoint, that an equal assessment, not exceeding the sum of — in the pound, upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, within the said [*parish, &c.*] of — shall be forthwith made by the said surveyor, and shall be allowed by one justice of the peace for the said [*hundred,*] and shall be collected by the said surveyor; and that the money so to be assessed and collected, shall be applied for and towards the amending, repairing, paving, cleansing, and supporting such highways, causeways, streets, pavements, and bridges, [and for buying materials, making satisfaction

for damages, erecting guide-posts, and paying the surveyor's salary (a),] according to the direction and true intent and meaning of the said Act.

A. B.

C. D.

N. B. *By Section 3, 54 Geo. 3. c. 109, The total assessments in any one year are not to exceed 1s. 9d. in the pound.*

No. XXVI. *Notice of application to be made for an assessment.—From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, p. 162, 167.*

Middlesex. { Notice is hereby given, that application
} will be made to the justices of the peace
acting for the [*hundred*] of —, in the said county, at
their Special Sessions to be held at —, in the said
[*hundred*,] on the — day of —, for an equal as-
sessment to be made, not exceeding — in the pound,
upon all and every the occupiers of lands, tenements,
woods, tithes, and hereditaments within the [*parish, &c.*]
of —, for the use and benefit of the highways within
the said [*parish, &c.*] Dated this — day of —,
18—.

A. B. Surveyor.

No. XXVII. *Summons for non-payment of assess-
ment.—Vide ante, p. 168.*

To A. O. of the — of —, in the county of
Middlesex.

County of { Whereas complaint and information have
— } been made upon oath before me, one of his
Majesty's justices of the peace for the said county, by the
surveyor of the highways for the said —, that by a
rate or assessment duly made, allowed, and published,
according to the Statutes in that case made and provided,
the sum of — was duly rated and assessed upon you for

(a) These words may be inserted, if there has been no former assess-
ment for these purposes.

and towards the amending, repairing, and supporting the highways within the said —, and that you the said A. O. have refused and neglected to pay the same within ten days after demand thereof made, and have not yet paid the same. These are therefore to require you personally to appear before me (or such other of his Majesty's justices of the peace as shall be present) at —, in the said county, on — the — day of —, at the hour of — in the — noon, there to answer to the said complaint and information, and to show cause why the said sum should not be levied on your goods and chattels pursuant to the said Statutes. Herein fail not. Given under my hand and seal, this — day of —, in the year of our Lord 18—.

No. XXVIII. *Warrant of distress for non-payment of money charged by an assessment (a).—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 168.*

Middlesex. { To the constable, headborough, or tything-
man of —, in the said county.

Whereas, by an assessment made upon the occupiers of lands, tenements, woods, tithes, and hereditaments, within the [*parish, &c.*] of — in the said county, for the purpose of, &c. [*as stated in the justices' order*] pursuant to an order of justices for that purpose, according to the directions of the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," A. B. was charged with the sum of — as his share and proportion of the said assessment, in respect of the lands, tenements, woods, tithes, and hereditaments, which he occupied within the said [*parish, &c.*]: And whereas it appears to me upon the oath of —, that the said sum of — hath been duly demanded from the said A. B., and that he hath refused to pay the same for the space of ten days after such demand made; these are therefore, in his

(a) For the constable's return when there are no effects, and the Form of Commitment for want

thereof, see post, Nos. LXI. and LXII.

Majesty's name, to command you to levy the said sum of — by distress of the goods and chattels of the said A. B.; and if the same shall not be paid within the space of four days next after such distress by you taken, together with the reasonable charges of taking and keeping the same, that you do then sell the said goods and chattels so by you distrained; and out of the money arising by such sale, that you do pay unto C. D. the surveyor of the highways for the said [*parish, &c.*] of —, the said sum of —, to be employed for the purposes aforesaid; and that you do return the surplus thereof to the said A. B. (the reasonable charges of taking, keeping, and selling the said distress being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of —, that then you certify the same to me, together with this warrant. Given under my hand and seal, the — day of —.

No. XXIX. *Order of the justices, at their Special Sessions, for the repairs of certain highways which most want repair.—From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, p. 169.*

Middlesex. { At a Special Sessions held at —, in the
[*hundred*] of — in the said county, the
— day of —, by justices of the peace
for the said county, acting within the said
[*hundred*.]

To the surveyors of the highways for the [*parish, &c.*]
of — in the said [*hundred*.]

It appearing to us, that the highway lying between — and —, within your liberty, is very foundrous and in bad repair, and being of great public use, we do hereby order, that you repair or cause the same to be repaired before the — day of — next. Given under our hands and seals, this — day of —.

No. XXX. *Information upon oath by the surveyors of the highways of a parish where private persons are liable to repair, that due notice had been given them of the order of two justices made on them for such repair at a Special Sessions, and that such repairs notwithstanding have not been made within the time as limited, in order that the magistrates or one of them, may present such highways, &c.—Vide ante, p. 170.*

County of } Whereas information was made unto J. P.
 _____ } and K. P. esquires, two of his Majesty's justices of the peace in and for the said county, by S. H., one of the surveyors of the highways of the parish of _____ in the said county, at a Special Sessions held at _____ in and for the hundred of _____ in the said county, on the _____ day of _____ last, that the public streets, causeways, pavements, and highways of _____, a town in the said parish of _____, in the county aforesaid, were very ruinous, broken, and in great decay, and that the several occupiers of houses in the said town of _____ were used, and had been immemorially accustomed, and ought to repair the same, each severally before his own premises. And whereas in pursuance of an Act passed in the 13th year of King George the Third, intituled, "An Act to explain, amend, and reduce into one Act of Parliament, the Statutes now in being for the amendment and preservation of the public highways, within that part of Great Britain called England; and for other purposes," the said two justices did then and there make an order (a) under their hands and seals, bearing date the _____ day of _____, in the year of our Lord 18—, directing the several persons hereinafter mentioned (amongst others) to repair their said streets, causeways, pavements, and highways respectively so out of repair in the said town and parish, on or before the _____ day of _____, in the year of our Lord 18—. The said S. H. and T. H. the other surveyor of the highways of the said parish of _____, respectively make oath that they the said surveyors of the highways of the said parish,

(a) See the preceding Form.

did give due notice of the said order to the several persons therein named; that some of the said persons have observed and obeyed the same; but that on an examination and inspection this morning, they find the streets, causeways, pavements, and highways, of the following persons, in the said town of —, and parish highways aforesaid, still unrepaired, and therefore they pray that the said streets, causeways, pavements, and highways, so out of repair, together with the persons liable to repair the same, may be severally and respectively presented by some one of his Majesty's justices of the peace at the next General Quarter Sessions of the peace for the said county of —, pursuant to the Statute in that case made and provided.

Persons liable to repair.

				Length.		Breadth.	
				Ft.	In.	Ft.	In.
W. B.	-	-	-	102	0—	9	0
W. P. esquire.	-	-	-	190	0—	10	0
James B.	-	-	-	128	0—	5	0
John B. (bounded on the north by lands of W. P. esq., but occupied by James B., and on the south by those of the Rev. J.W., occupied by W. J.)				145	0—	10	0
The same John B. (bounded, &c.)							
&c. &c.				24	0—	8	0

And the said S. H. and T. H. further depose, that the several parts or portions of the streets so out of repair belonging to the said John B. to repair, being detached from each other, are bounded as before mentioned.

S. H.
T. H.

Sworn before me, this — day
of —, 18—.

J. P.

No. XXXI. *Warrant of distress for not scouring
ditches, &c.—Vide ante, p. 172.*

To the constable of the parish of —, in the county
of —.

— } Forasmuch as A. O. of the parish of —,
to wit. } in the said county of —, is convicted before

me Sir G. C. bart., one of his Majesty's justices of the peace in and for the said county; for that he the said A. O. (being the occupier of lands next adjoining to the common highway in the said parish of —, and liable to cleanse, open, and scour the ditch and drain lying between the said common highway and the lands so occupied by him the said A. O. as aforesaid, in order to drain and keep dry the said common highway next unto such ditch as often as occasion should be, and having had due and legal notice from the surveyors of the said parish to open, cleanse, and scour the said ditch or drain so adjoining to the said highway as aforesaid,) hath for the space of ten days after such notice, neglected, refused, and made default in opening, cleansing, and scouring the said ditch or drain adjoining to the said highway in the said parish of —, whereby he hath forfeited the sum of ten shillings: These are therefore in his said Majesty's name, to command you to levy the said sum of ten shillings by distress of the goods of him the said A. O.; and if within the space of five days next after such distress by you taken, the said sum of ten shillings, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained, and out of the money arising by such sale, that you do pay the said sum of ten shillings to him the said surveyor, to be employed in such manner as the Statute in that case directs, returning to him the said A. O. the overplus (the reasonable charges of taking, keeping, and selling the said distress being first deducted) upon demand. Given under my hand and seal, this — day of —.

G. C. (L. S.)

No. XXXII. *Order of a justice of peace to make new drains.—From Schedule to Stat. 13 Geo. 3. c. 78. Vide ante, p. 172.*

Middlesex. { To C. D. of —, surveyor of the highways
for the [parish, &c.] of —.

Whereas complaint hath been made to me A. B. esq., one of his Majesty's justices of the peace for the said county, that the ditch, gutter, or water-course, for con-

veying the water from the highway at —, in the [*parish, &c.*] of — in the said county, is not sufficient for that purpose, and that the cleansing and opening the same will not effectually carry off the said water, but that the said highway may be effectually drained and the water carried off, by making a new ditch or drain through the lands or grounds of —, lying near the same, for the length of — yards, and the breadth of — feet; and the said — having been duly summoned to appear before me, to shew cause, if he had any, why the said ditch or drain should not be made, and the said — not appearing, [*or, not shewing sufficient cause against the same,*] and it appearing to me that such ditch or drain is necessary, I do hereby order and require you to enter into and upon the said lands of the said —, and there make, or cause to be made, a new ditch or drain, of the length and breadth aforesaid, and of a convenient depth, making or tendering sufficient satisfaction to the said — for the damages to be done thereby, within one calendar month after the same shall be so made; such damages to be settled and ascertained in manner directed by the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways." Given under my hand, this — day of —.

No. XXXIII. *Notice from the surveyor to remove nuisances and obstructions, and to cut hedges, &c. From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, pp. 174. 490. 499.*

To C. D. of —.

In pursuance of the directions given by the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," I, A. B., surveyor of the highways for the [*parish, &c.*] of —, do hereby give you notice forthwith to remove the [*dung, timber, stone, &c. &c.*] placed by you in a certain part of the King's highway, lying between — and — in the [*parish, &c.*] of —, to the obstruction and annoyance of the said highway: [*Or, forthwith to cut, prune, and plash the hedges, and cut*

or prune the trees, and to open, cleanse, and scour the several ditches and water-courses belonging to you, in or near the highway lying between — and —, in the [parish, &c.] of —, to the intent that the water may be drained from the said highway, and that the sun and wind may not be excluded from such highway to the prejudice thereof.] Dated this — day of —.

A. B.

No. XXXIV. *Information of surveyor of highways against a person for not pruning hedges, &c.—*
Vide ante, p. 174.

County of } Be it remembered, that on the — day
— } of —, 18—, the undersigned surveyor of
the highways of the parish of —, in the said county,
informeth and maketh oath before me, one of his Ma-
jesty's justices of the peace in and for the said county
of —, that A. O. of —, in the said county, yeoman,
having had due notice to cut, prune, and plash his hedges,
cut, prune, or lop the trees, and open, cleanse, and scour
his ditches and water-courses, within or adjoining to the
public highways in the said first above-named parish, as
well as to remove the soil or earth dug out thereof, hath
neglected to do the same within the time limited by law
and required by such notice, contrary to the Statute made
in the 13th year of the reign of his Majesty King George
the Third, "For the amendment and preservation of the
highways," which hath imposed a forfeiture of ten shil-
lings for the said offence.

Taken and sworn the day and year above written, before me,	}	J. P.	}	S. H.	}	Surveyor of the Highways.
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No. XXXV. *Summons of an offender for not pruning hedges, &c.—* *Vide ante, p. 174.*

County of } To all constables, tithingmen, and others his
— } Majesty's officers of the peace whom these
may concern.

Whereas complaint and information have been made upon oath before me, one of his Majesty's justices of the

peace in and for the said county of —, by the surveyor of the highways of the parish of —, in the said county, that A. O. of —, in the county aforesaid, yeoman, having had due notice to cut, prune, and plash his hedges, cut, prune, or lop the trees, and open, cleanse, and scour his ditches and water-courses, within or adjoining to the public highways in the said first above-named parish, as well as to remove the soil or earth dug out thereof, hath neglected to do the same within the time limited by law and required by such notice, contrary to the Statute made in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," which hath imposed a forfeiture of ten shillings for the said offence. These are therefore to require you in his Majesty's name, to summon the said offender to appear before me, and such others of his Majesty's justices of the peace for the said county of —, as shall be present at the —, in —, in the said county, on —, the — day of — instant, at the hour of — in the forenoon, to answer to the said complaint and information. Herein fail not, as also to make due return hereof at your peril. Given under my hand, this — day of —, 18— (a).

No. XXXVI. *Form of precept to the high constable for appointing a Special Sessions for surveyors to make returns as to the state of the highways:— Of persons who have neglected to cut and prune their hedges, trees, &c. &c.—Vide ante, p. 174.*

County of } To J. W. — high constable of the hundred
 — } of —, in the said county of —.

We, two of his Majesty's justices of the peace for the said county, (one whereof is of the quorum,) do hereby require you, immediately upon the receipt hereof, to issue your warrants to all the petty constables within your said

(a) See Warrant of Distress for the penalty, ante, No. XXXI.

hundred, in the form hereon indorsed (a). Given under our hands and seals, the — day of —, in the year of our Lord 18—.

(L. S.)
(L. S.)

No. XXXVII. *High Constable's Precept for a Special Sessions for surveyors to make return as to the state of the highways, of persons who have neglected, &c.—Vide ante, p. 174.*

County of _____ }
Hundred of _____ } To the constable of the parish of _____.

By virtue of a precept from two of his Majesty's justices of the peace for the county of —, acting within the said hundred, to me directed, you are hereby required to give notice to the surveyors of the highways within your said parish, that they are personally to appear before the said justices, at a Special Sessions to be held for the said hundred of —, for executing the purposes of the Acts relating to the highways, on — the — day of — next, at the hour of — in the forenoon of the same day, at —, in the said county, then and there to make returns in writing of the state of all the roads, common highways, bridges, causeways, pavements, hedges, ditches, and water-courses appertaining to, and of all nuisances, and encroachments made upon the several highways within their respective parishes, and of which they are surveyors, and also of all persons who have neglected, or shall neglect in your said constablewick to cut, prune, and plash their hedges, to cut, prune, or lop the trees growing in or near such hedges and fences as adjoin the highways, and to open, cleanse, and scour the ditches and water-courses; and also at the same time to be examined as to the written notices by them given for these purposes, as well as to what they may have done in their

(a) See next Form.

office, in giving notice in the church of the time and place for compounding for statute labour on the highways, and otherwise for carrying of the Highway Acts into execution. You will further inform the said surveyors of the highways, that they may then have an order of two magistrates to enable them to receive a composition in money instead of performance of statute duty in kind. You will moreover inform all those justices of the peace, who reside in your parish, of the time and place appointed for the said Sessions. And be you then there to make due return hereof. Given under my hand, at —, in the said county, the — day of —, 18—.

J. W., High Constable.

No. XXXVIII. Order for occupiers of land to make hedges, and cut down trees. *Vide ante*, p. 174.

At a Special Sessions held at —, in the hundred of —, in the county of —, on —, the — day of —, in the year of our Lord —, by justices of the peace for the said county, acting within the said hundred.

— } Whereas complaint hath been made unto
to wit. } us by A. S., surveyor of the highways of the
parish of —, that A. O. of the said parish hath had
due notice from him to cut, prune, and plash his hedges
adjoining, and to cut down or to prune and lop the trees
growing in and near such hedges, in such manner that
the highways may not be prejudiced by the shade thereof,
and that the sun and wind might not be excluded there-
from to the damage thereof (pursuant to the Statute made
in the 13th year of the reign of his Majesty King George
the Third), but that he hath not complied with such no-
tice, or with the requisites of the said Act.

And whereas the said A. O. having been duly summoned to answer the said complaint, hath made default in his appearance. Now we, upon duly considering the circumstances of the case, do order that such hedges be cut, plashed, and pruned, so as not to exceed the height of — from the surface of the field, and that all such trees as grow in and near such hedges, in the grounds occupied by the said A. O. near the said highway, be cut

down, or be pruned and lopt, so that the sun and wind may not be excluded from such highway; and we do further order, that in case the said A. O. shall not obey this order within ten days from the date hereof, that then A. S. the said surveyor, do cut, prune, and plash such hedges, and cut down, or prune and lop such trees in manner directed by this order, and proceed against the said A. O. immediately afterwards for recovery of the penalties and charges he will thereby incur. Given under our hands and seals, the day and year first above written.

No. XXXIX. *Allowance of charges and expences paid by surveyors, which are to be repaid by the possessors of the lands, &c. and order of the justice for that purpose.—From Sched. to Stat. 13 Geo. 3. c. 78.—Vide ante, pp. 175. 500.*

Middlesex. { Whereas complaint hath been made unto
me, A. B. esq. one of his Majesty's justices
of the peace of the said county, by the oath of —, surveyor of the highways for the parish of — in the said county, that C. D. of —, having had due notice to cut and prune his hedges, and cleanse and scour his ditches and water-courses within or adjoining to the public highway between — and — in the said parish of —, hath neglected to do the same within the time required by such notice; and that the said — hath caused the same respectively to be cut, pruned, cleansed, and scoured, pursuant to the directions of the Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," and hath expended therein the sum of —, as appears by an account now produced to me, which I think a reasonable charge, and do therefore allow the same; and hereby order the said C. D. to pay the said sum of — to the said — within six days from the time of his being served with this order. Given under my hand and seal, this — day of —.

No. XL. *A precept for erecting guide-posts, &c.—From Sched. to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 176.*

Middlesex. { At a Special Sessions held at —, for the
[hundred] of — in the said county,
before justices of the peace for the said
county, acting within the said [hundred],
on the — day of —.

To the surveyor of the [parish, &c.] of — in the
said [hundred.]

You are hereby required forthwith to erect, or cause to be erected, in the most convenient place upon the highway lying between — and —, within your liberty, where the roads cross or branch out, a guide-post with proper inscriptions, painted on both sides thereof in large legible letters, denoting the towns of — and — [or other places as the justices shall think most proper]. (*Where graduated stones or posts are necessary to prevent accidents from deep waters, vary it as under*). In the most convenient place upon the highway, at the approach or entrance on each side of the ford or water called —, at —, within your liberty, graduated posts, denoting the depth of water in the deepest part thereof through which such highway passes; and you are allowed to charge the reasonable expences of providing and erecting the same, in your accounts.

A. B.

C. D.

No. XLI. *Notice for holding a vestry or other public meeting.—From Sched. to Stat. 13 Geo. 3. c. 78. Vide ante, p. 177.*

Notice is hereby given, that a vestry or public meeting will be held at —, on the — day of — next, at the hour of — in the — noon, in order to consult about the times when it will be most convenient for the inhabitants of this (*parish, &c.*) to be excused from being called forth to perform their statute duty, according to the indulgence given them by an Act passed in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways."

Dated the — day of —.

A. B. [constable] [headborough, &c.]

No. XLII. *Order of two justices for widening [or, diverting and turning] a highway.—From Sched. to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 379.*

Middlesex. { We, — — —, two of his Majesty's justices of the peace for the said county, acting within the hundred, &c. of — — —, within the said county, having upon view found that a certain part of the highway between — — — and — — —, in the parish &c. of — — — in the said hundred, for the length of — — — yards, or thereabouts, and particularly described in the plan hereunto annexed is, for the greatest part thereof narrow [*and cannot be conveniently enlarged and made commodious for travellers, without diverting and turning the same; and having viewed a course proposed for the said new highway, through(a)*] the lands and grounds of — — — and — — —, of the length of — — — yards, or thereabouts, and of the breadth of — — — feet, or thereabouts, particularly described in the plan hereunto annexed, which we think will be much more commodious to the public, we do hereby order, That the said highway be [*diverted and turned(b)*] through the lands aforesaid; and that the surveyor of the highways for the (parish, &c.) of — — — where the said old highway lies, do forthwith proceed to treat and make agreement with the said — — — and — — — for the recompence to be made for the said ground, and for the making such ditches and fences as shall be necessary, in such manner, with such approbation, and by pursuing such measures and directions in all respects as are warranted and prescribed by the Statute made in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways;" and also by an Act passed in the 55th year of the reign of his said Majesty, intituled, "An Act to amend the said Act, in so far as the same relates to notice of appeal against turning or diverting a public highway, and to extend the provisions of the same Act to the stopping up of unnecessary roads." And in case such agreement shall be made as aforesaid, we do order an equal assessment, not exceeding the rate of sixpence in the pound, to be made, levied, and col-

(a) When it is only to be widened, leave out the words in italics, and insert—"But may be conveniently enlarged and wi-

"dened, by adding thereto from."

(b) Or, "widened and enlarged."

lected upon all and every the occupiers of lands, tenements, woods, tithes, and hereditaments, in the said (parish, &c.) of —, and that the money arising thereupon be paid and applied in making such recompence and satisfaction as aforesaid pursuant to the direction of the said Act.

A. B.
C. D.

No. XLIII. *Certificate from the said Justices to the Court of Quarter Sessions (a).—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 380.*

To the justices of the peace, at their General Quarter Sessions, to be held at — in the said county, the — day of —.

We, the within-named A. B. and C. D., do hereby certify to the said Court of Quarter Sessions, that we made and signed the within order; and that with our approbation, and by our direction, the said surveyor hath treated with the said — and — for the said lands required for the purposes aforesaid, but was not able to make any agreement for that purpose with them, or either of them; and that he tendered to the said — the sum of —, and to the said — the sum of —, as a recompence for the said ground, and for the making the said ditches and fences, which they, and each of them, refused to receive.

A. B.
C. D.

No. XLIV. *Order for stopping up the old highway, and selling the land and soil thereof (b).—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 388.*

We, whose names are subscribed, being the justices of the peace who have viewed the several highways described in the plans hereunto annexed, and made order for diverting the old highway; and being satisfied that the new highway therein described is properly made,

(a) This is to be written upon the above order, when no agreement can be made.

(b) If there are more highways

than one to be stopped up, there should be a separate order for each. See 6 B. & C. 645, note.

and fit for the reception of travellers (a), do hereby order the said old highway, being of the length of — yards, and of the breadth of — feet, upon a medium, as appears by the said plan, to be stopped up, and the land and soil thereof to be sold by the said surveyor to —, whose land adjoins thereto, if he shall be willing to purchase the same, for the full value thereof, if not, to some other person or persons for the full value thereof; [reserving nevertheless to — a free passage for persons, horses, cattle, and carriages, through the land and soil of the said old highway, to and from the land, &c. belonging to him, called —, according to his ancient usage thereof (b).]

No. XLV. *Certificate to be written under the order above mentioned.—From Sched. to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 388.*

We, the above-named justices, do certify, That the old highway, hereinbefore mentioned and described, was sold by the said surveyor to — with our approbation, for the sum of —, which sum we do order the said — to pay to the said surveyor, to be applied in purchasing the land, and making the said new highway; and if any surplus remains, we do order that the same shall be applied for the use of the highways within the said (parish, &c.) of —.

No. XLVI. *Receipt for the purchase-money to be indorsed upon, or written under the certificate above mentioned.—From Sched. to Stat. 13 Geo. 3. c. 78. Vide ante, p. 388.*

Received the — day of — from the said — the sum of —, being the full consideration-money for the purchase of the said old highway hereinbefore described, pursuant to the said orders and certificate.

(a) This is a sufficient certificate of the state of the new highway. *De Ponthieu v. Pennyfather*, 5 Taunt. 634.

(b) This reservation to be inserted where necessary, and varied according to the circumstances of the case.

No. XLVII. *Consent from the owners of the land through which a new highway is proposed to be made.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 384.*

I, A. B. of —, in the county of —, being owner of the lands described in the plan hereunto annexed, through which part of a certain highway lying between — and —, is intended to be diverted and turned, in consideration of the sum of — to be paid to me for the said land, and the soil thereof; [or, in consideration of the said old highway being sold, exchanged, and to be vested in me, and also of the sum of — to be paid to me, *as the case may be,*] do hereby consent to the making and continuing such new highway through my said lands. Given under my hand and seal, this — day of —.

No. XLVIII. *Order of two justices, for diverting and turning a public highway, bridleway, or footway (as the case shall be) through the lands of any person who consents thereto.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 384.*

Middlesex. { We, — and —, esquires, two of his Majesty's justices of the peace for the said county, at a Special Sessions held at —, in the hundred of —, in the said county, on the — day of —, 18—, having upon view found that a certain part of a highway, &c. within the [*parish, &c.*] of —, in the said hundred, lying between — and —, for the length of — yards, or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same nearer [or, more commodious] to the public; and having viewed a course proposed for the new highway, in lieu thereof, through the lands and grounds of —, of the length of — yards, or thereabouts, and of the breadth of — feet, or thereabouts, particularly described in the plan hereunto annexed, and having received evidence of the consent of the said —

to the said new highway being made through his lands hereinbefore described, by writing under his hand and seal, we do hereby order that the said highway be diverted and turned through the lands aforesaid; and we do order an equal assessment, &c. [*in the same form as before mentioned*, No. XLII.]

No. XLIX. *Form of notice of the order for diverting, &c. a highway.—From Schedule to Statute 55 Geo. 3. c. 68.—Vide ante, p. 385.*

Notice is hereby given, that on the — day of — last, an order was signed by A. B. and C. D. two of his Majesty's justices of the peace in and for the county of —, for [*if the order be for turning, diverting and stopping up, &c. here so state it, and describe the road ordered to be turned, diverted, and stopped up; if the order be for stopping up a useless road, here so state it, and describe the road ordered to be stopped up;*] and that the said order will be lodged with the clerk of the peace for the said county, at the General Quarter Sessions of the peace to be holden at — in and for the said county, on the — day of — next, and also that the said order will at the said Quarter Sessions be confirmed and enrolled, unless upon an appeal against the same to be then made, it be otherwise determined.

No. L. *Indictments relating to highways.*
See ante, pp. 468. 507.

1st. *Indictment for not repairing a common ancient highway.*

County of } The jurors for our Lord the King, upon
— } their oath present, that from the time whereof
the memory of man is not to the contrary, there was and
yet is a common and ancient king's highway, leading from
the town of —, in the county of —, towards and
unto the market-town of —, in the county of —,
used for all the liege subjects of our said Lord the King,
and of his predecessors, with their horses, coaches, carts,
and carriages, to go, return, pass, ride, and labour at

their will and pleasure, and that a certain part of the same king's common highway, situate, lying, and being in the parish of —, in the county of — aforesaid, beginning at the place called —, and so continued towards the market-town of — aforesaid, for the length of — feet, and being of the breadth of — feet, on the — day of —, in the — year of the reign of —, and continually afterwards, until the day of the taking of this inquisition, was and yet is in great decay, for the want of due reparation and amendment of the same; so that the subjects of our said Lord the King, passing and travelling through the same, with their horses, coaches, carts, and carriages, could not, during the time aforesaid, nor yet can, go, return, pass, ride, and labour, without great danger; to the great damage and common nuisance of all the liege subjects of our said Lord the King, passing through that way, and against the peace of our said Lord the King, his crown and dignity; and that the inhabitants of the said parish of —, in the said county of —, the common highway aforesaid, (so as aforesaid being in decay) ought to repair and amend, when and so often as it shall be necessary.

[Or, that A. O. of — aforesaid, gentleman, ought, by reason of the tenure of his lands and tenements, situate, lying, and being at — aforesaid, in the county aforesaid, to repair and amend the said highway, when and so often as it shall be necessary.]

2d. Indictment for not repairing an ancient horse and footway.

County of } The jurors for our Lord the King, upon
 ——— } their oath present, that from the time whereof
 the memory of man is not to the contrary, there was and
 yet is, a certain common and ancient highway, leading
 from —, in the county of —, to —, in the county
 of —, for all the liege subjects of our said Lord the
 King and his predecessors, on horseback and on foot, to
 go, return, pass, ride, labour, and drive their cattle at
 their will, and that a certain part of the same common
 highway, situate, lying, and being within the parish of
 —, in the county of — aforesaid, beginning at a
 place called —, and so continued towards the said —

of —, in the county of — aforesaid, of the length of — feet, and of the breadth of — feet, on the — day of —, in the — year of the reign of —, and continually afterwards, until the day of taking this inquisition, at the parish of — aforesaid, in the county aforesaid, was and yet is very ruinous, miry, deep, broken, and in such decay, for want of due reparation and amendment of the same, that the liege subjects of our said Lord the King, by and through the same way, with their horses and cattle, could not, during the time aforesaid, nor yet can, go, return, pass, ride, and labour, as they ought and were wont to do, without great danger of themselves and of their goods, to the great damage and common nuisance of all the liege subjects of our said Lord the King, through the same highway going, returning, passing, riding, and labouring, and against the peace of our said Lord the King; and that the inhabitants of the same parish of —, in the county aforesaid, the same common highway so as aforesaid being in decay, ought to repair and amend, when and so often as it shall be necessary.

3d. Indictment for encroaching upon a highway, by building thereupon.

———— } The jurors for our Lord the King, upon
to wit. } their oath present, that A. O. late of —, carpenter, the — day of —, in the — year of the reign of —, with force and arms, at —, in and upon a common highway, in a certain place, commonly called —, there, leading from — to —, by a certain building there, containing in length — feet, and in breadth — feet, by him the said A. O. erected and built, hath unlawfully and unjustly encroached, and doth yet encroach, and the building aforesaid, so as is aforesaid erected and built by him the said A. O. from the aforesaid — day of —, in the year aforesaid, unto the day of exhibiting this information, at — aforesaid, in the county aforesaid, with force and arms, unlawfully and unjustly hath continued, and doth continue, by reason whereof the common highway aforesaid hath become and is greatly straitened, so that the liege subjects of our said Lord the King, upon and through the same common

highway aforesaid, with their horses, carts, and carriages, cannot go, pass, ride, and labour as they ought and were wont to do, to the great and common nuisance of all the liege subjects of our said Lord the King, in and through the said common highway going, passing, riding, and labouring, and against the peace of the said Lord the King (a).

4th. Indictment for inclosing the highway.

_____ } The jurors for our said Lord the King, upon
to wit. } their oath present, that whereas from the time
whereof the memory of man is not to the contrary, the
liege subjects of our said Lord the King had and lawfully
used a certain common highway at _____, in the said
county, in a certain place there, called _____, leading
from the town of _____ aforesaid to the town of _____, for
themselves and their goods, without any stoppage or
hindrance by any ditches, hedges, or other obstacles
whatsoever; nevertheless, one A. O. of _____ aforesaid,
in the county of _____ aforesaid, yeoman, on the _____ day
of _____, in the _____ year of the reign of _____, with force
and arms, at _____ aforesaid, in the county of _____ afore-
said, in the place aforesaid, called _____, upon the com-
mon highway aforesaid, a certain ditch and quickset
hedge did make, and the said ditch and quickset hedge
so as aforesaid made, doth yet continue and keep; to the
great stoppage and hindrance of the liege subjects of
our said Lord the King passing in and through the said
common highway, and against the peace of our said Lord
the King.

*5th. Indictment for laying timber or other obstructions
in the highway.*

_____ } The jurors for our Lord the King, upon
to wit. } their oath present, that A. O. late of _____, in
the county aforesaid, yeoman, on the _____ day of _____, in
the _____ year of the reign of _____, and on divers other

(a) For the Form of an Indictment for not repairing a house standing on the highway, ruinous

and like to fall down, see Lord Raym. Entries, 25.

days and times, as well before as afterwards, with force and arms, at —, in the said county, in and upon the King's common highway there, leading from — unto the town of —, divers great pieces of timber put and placed, and caused to be put and placed, and the same great pieces of timber so as aforesaid put and placed from the aforesaid — day of —, in the — year aforesaid, until the day of exhibiting this information, in and upon the King's common highway aforesaid, to be, lie, and remain, hath permitted, and doth still permit, to the grievous and common nuisance of all the lieges and subjects of the said Lord the King, upon and through the King's common highway aforesaid, going, passing, riding, and travelling, and against the peace of our said Lord the King, his crown and dignity.

[Or, — great quantity of dung and other filth, by reason whereof divers hurtful and unwholesome smells from the said dung and other filth did then and there arise, and thereby the air there became, was, and is corrupted and infected, &c.]

[Or, — cart loads of rubbish —, by reason whereof the said highway for the whole time aforesaid was straitened and obstructed, so that the liege subjects of our said Lord the King could not so freely pass and repass about their lawful business, through the said common highway there, as they ought and have been accustomed, &c.]

*6th. Indictment for stopping up a water-course,
whereby the highway is overflowed.*

———— } The jurors for our Lord the King, upon
to wit. } their oath present, that A. O. late of the parish of —, in the county aforesaid, yeoman, on the — day of —, in the — year of the reign of —, with force and arms, at the parish aforesaid, in the county aforesaid, a certain ancient water-course adjoining to the King's common highway, within the said parish, leading from the town of —, in the county aforesaid, towards and unto —, with gravel and other materials, unlawfully and injuriously did obstruct and stop up; and the said water-course so as aforesaid obstructed and stopped up from the said — day of —, in the year

aforesaid, until the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously hath continued and still doth continue; by reason whereof the rain and waters that were wont and ought to flow and pass through the said watercourse on the same day and year, and divers other days and times afterwards, between that day and the day of the taking of this inquisition, did overflow and remain in the king's common highway aforesaid, and thereby the same was and yet is greatly hurt and spoiled, so that the liege subjects of our said Lord the King, through the same way, with their horses, coaches, carts, and carriages, then and on the said other days and times could not nor yet can go, return, pass, ride, and labour, as they ought and were wont to do; to the great damage and common nuisance of all the liege subjects of our said Lord the King, through the same highway going, returning, passing, riding, and labouring, and against the peace of our said Lord the King.

No. LI. *Certificate by two justices, that an indicted road is in good repair.—Vide ante, p. 480.*

———— } We, two of his Majesty's justices of the
to wit. } peace of the county of —, acting in and
for the said county, do hereby certify, that we have this
day viewed and surveyed a certain part of a common and
ancient king's highway, leading [*here describe the road,*]
indicted at the last — Assizes or, [at the last General
Quarter Sessions of the Peace,] for the said county, and
that the said part of the said highway so indicted as afore-
said, is now in good and sufficient repair, and likely so
to continue. Given under our hands and seals, this —
day of —.

J. P. (L. S.)
K. P. (L. S.)

No. LII. *Warrant to apprehend the driver of a waggon, cart, &c. for misbehaviour.*—*Vide ante, p. 496.*

County of }
to wit. } To all constables, and other his Majesty's officers of the peace for the said county.

These are, in his Majesty's name, to command you and every of you upon sight hereof, to take and bring before me, or some other of his Majesty's justices of the peace for the said county, the body of A. D., the driver of a certain — belonging to —, of — in the said county, —, to answer to all such matters and things as on his Majesty's behalf are on oath objected against him by —, for riding upon a certain carriage called a — in a public highway in the said county, he the said A. D. not having some other person on foot or on horseback to guide the same, and which said carriage was not then conducted by some person holding the reins of the horses drawing the same. Hereof fail not at your peril. Given under my hand and seal, this — day of —, and in the year of our Lord —.

No. LIII. *Order for payment of a forfeiture for riding on a waggon, &c.*—*Vide ante, p. 496.*

County of } Whereas A. O. of —, in the said county, — } labourer, is duly convicted before me, J. P. esquire, one of his Majesty's justices of the peace in and for the said county, upon the oath of A. W. a credible witness [*or as the case may be,*] for that he the said A. O., on the — day of — instant, in the king's highway, lying between N. and O. within the parish of P. in the said county of —, did ride upon the cart, [*or as the case may be,*] of his master L. M. of —, in the county of —, not having some other person on foot, or on horseback to guide the same, nor holding any reins in his hand to guide the horses drawing the same, whereby he the said A. O. hath forfeited the sum of ten shillings. I do, therefore, hereby order the said A. O. to pay to S. H. surveyor of the highways of the parish of — aforesaid, the said sum of ten shillings to be by him disposed of as the law directs. Given under my hand and seal, the — day of —, in the year of our Lord —.

No. LIV. *Surveyor's Return of the state of the highways (a).—Vide ante, p. 498.*

——— } We, A. B. and C. D. surveyors of the high-
to wit. } ways for the parish of ———, do hereby certify,
that we have, in pursuance of a warrant to us directed,
taken a view of all the roads, highways, &c. within our
said parish, and that the same are in good repair, that
his Majesty's subjects may pass and repass without dan-
ger; and that there are no nuisances or encroachments
thereon.

Sworn the ——— day of ———,
before us,

A. B.
C. D.

No. LV. *Presentment by a justice of peace (b).—From
Schedule to Statute 13 Geo. 3. c. 78.—Vide ante,
p. 500.*

Middlesex. { At the General Quarter Sessions of the
peace of our Lord the King, held for the said
county at ———, in the said county, on ——— the ——— day
of ———, in the ——— year of the reign of ———, before
———, esquires, and others, their companions, justices of
our said Lord the King, assigned to keep the peace in
the said county, and also to hear and determine divers
felonies, trespasses, and other misdemeanors in the said
county committed; A. B. esquire, one of the justices of
our said Lord the King, assigned for the purposes afore-
said, by virtue of an Act made in the 13th year of the
reign of his Majesty King George the Third, "For the
amendment and preservation of the highways," upon his
own view, [*or*, upon information upon oath, to him given
by C. D., surveyor of the highways for the parish, &c.
of ———, in the said county] (c), doth present, that from
the time whereof the memory of man is not to the con-
trary, there was, and yet is, a certain common and
ancient king's highway, leading from the town of ———,
in the said county, &c. towards and unto ———, within
the same county, used for all the king's subjects, with

(a) See the precept for the Sessions, at which this return is to be made, ante, No. XXXVII.

(b) This form of presentment is confined to cases of non-repair. Where the offence is a nuisance,

it must be alleged to be done "against the form of the Statute." *Rex v. Winter*, 13 East, 258.

(c) This to be inserted where it is upon the information of the surveyor.

their horses, coaches, carts, and carriages, to go, return, and pass at their will; and that a certain part of the same king's common highway, commonly called —, situate, lying, and being in the parish, &c. of —, in the same county, containing in length — yards, and in breadth — feet, on the — day of —, in the — year of the reign of —, and continually afterwards until the present day, was and yet is very ruinous, deep, broken, and in great decay, for want of due reparation and amendment, so that the subjects of the King, through the same way, with their horses, coaches, carts, and carriages, could not, during the time aforesaid, nor yet can go, return, or pass, as they ought and were wont to do, to the great damage and common nuisance of all the king's subjects through the same highway going, returning, or passing, and against the peace of our said Lord the King; and that the inhabitants of the parish, &c. of — aforesaid, in the county aforesaid, the said common highway (so in decay) ought to repair and amend, when and so often as it shall be necessary. In testimony whereof, the said A. B. to these presents hath set his hand and seal, this — day of —, in the year aforesaid.

No. LVI. *Summons for any person or persons to attend a justice or justices.—From Schedule to Stat. 13 Geo. 3. c. 78.—Vide ante, p. 510.*

Middlesex.—To A. B. &c. of —.

Whereas complaint and information hath been made upon oath before me C. D. one of his Majesty's justices of the peace for the said county, &c. by E. F. of —, that, &c. [*here state the nature and circumstances of the case, as far as it shall be necessary to show the offence and to bring it within the authority of the justice, and in doing that, follow the words of the Act as near as may be.*] These are therefore to require you personally to appear before me, [*or, the justices to be assembled at their Special Sessions to be holden*] at —, in the said county, &c. on the — day of — next, at the hour of — in the — noon, to answer to the said complaint and information, made by the said E. F. who is likewise directed to be then and there present, to make good the same. Herein fail not. Given under my hand and seal, this — day of —.

No. LVII. *Information.*—*From Sched. to Stat. 13 G. 3. c. 78.*—*Vide ante, p. 510.*

Middlesex. { Be it remembered, that on the — day of —, A. B. of —, in the said county, informeth and maketh oath before me —, one of his Majesty's justices of the peace for the said county, that — of —, in the said county, [*here describe the offence, and if it is for default in performing statute duty, state the duty required, and the notice given for that purpose, and the neglect according to the fact, and as near the words of the Act as may be.*] contrary to the Statute made in the 13th year of his Majesty King George the Third, "For the amendment and preservation of the highways," which hath imposed a forfeiture of — for the said offence.

A. B.

Taken and sworn, the — day
of —, before me,

No. LVIII. *Form of Conviction.*—*From Schedule to Stat. 13 Geo. 3. c. 78.*—*Vide ante, p. 510.*

Middlesex. { Be it remembered, that on the — day of —, in the year of our Lord —, at —, in the county aforesaid, A. B. came before me, C. D. esquire, one of his Majesty's justices of the peace for the said county, and informed me that E. F. of —, on the — day of — now last past, at —, in the said county, did [*here set forth the fact, in the manner described by the Statute*] whereupon the said E. F. after being duly summoned to answer the said charge, appeared before me —, on the — day of —, at —, in the said county, and having heard the charge contained in the said information, declared, that he was not guilty of the said offence; but the same being fully proved upon the oath of G. H. a credible witness, it manifestly appears to me, the said justice, that he the said E. F. is guilty of the offence charged upon him in the said information; It is therefore considered and adjudged by me, the said justice, that the said E. F. be convicted, and I do hereby convict him of the offence aforesaid; and I do hereby declare and adjudge, that he the said E. F. hath forfeited the sum of —, of lawful money of Great Britain, for

the offence aforesaid, to be distributed as the law directs, according to the form of the Statute in that case made and provided. Given, &c.

*Where the party refuses to appear upon the summons : After the words, " being duly summoned to answer to the said charge," insert—*did not appear before me pursuant to the said summons: [*or, did neglect and refuse to make any defence against the said charge;*] but the same being fully proved, &c. *as before.*

*When the party accused confesses the charge :—After the words, " contained in the said information," insert—*acknowledged and voluntarily confessed the same to be true, and it manifestly appears to me the said justice, &c. *as above.*

No. LIX. *Order for payment of a forfeiture.*

Vide ante, p. 510.

Middlesex. { To A. O. of —, in the county of —,
labourer.

Whereas you the said A. O. are duly convicted before me, J. P. esquire, one of his Majesty's justices of the peace, for the said county, for that you the said A. O. [*here describe the offence as set forth in the information*] whereby you have forfeited the sum of —: I do therefore hereby order you the said A. O. forthwith [*or, within such time as the Act directs*], to pay to A. S. surveyor of the — of —, in the said county, the said sum of —, to be by him disposed of as the law directs. Given under my hand and seal, the — day of —, 18—.

No. LX. *Warrant to distrain for the forfeiture (a).*

From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, pp. 175. 510.

Middlesex. { To the (constable) headborough, or tything-
man of —.

Whereas A. B. of —, in the said county, yeoman, is this day convicted before me, C. D. esquire, one of his

(a) Not to be issued till after six days from service of the order for payment. 13 Geo. 3. c. 78. s. 73.

Majesty's justices of the peace in and for the said county, upon the oath of G. H. a credible witness, for that the said A. B. hath [*here set forth the offence, describing it particularly in the words of the Statute, as near as may be*] contrary to the Statute in that case made and provided, by reason whereof the said A. B. hath forfeited the sum of —, to be distributed as herein is mentioned, which he hath refused to pay: These are therefore in his Majesty's name to command you to levy the said sum of — by distress of the goods and chattels of him the said A. B.; and if within the space of four days next after such distress by you taken, the said sum of —, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained; and out of the money arising by such sale, that you do pay (a) one half of the said sum of — to E. F. of —, who informed me of the said offence, and the other half of the said sum of — to J. K. the surveyor of the highways for the [parish, township, or place], where the said offence [neglect or default] happened, to be employed towards the repair of the said highways, returning the overplus, upon demand, to him the said A. B. (the reasonable charges of taking, keeping, and selling the said distress being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of —, that then you certify the same to me, together with this warrant. Given under my hand and seal, the — day of —,

C. D.

No. LXI. *Return of the Constable to be made upon the warrant of distress when there are no effects.*
From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, pp. 168. 510.

I, A. B. constable of the (*parish, &c.*) of — in the county of —, do hereby certify and make oath, that by virtue of this warrant, I have made diligent search for the goods of the within-named —, and that I can find no

. (a) This to be varied according to the Act in each particular case.

sufficient goods whereon to levy the within sum of —, as witness my hand, the — day of —.

A. B.

Sworn before me, the day
and year, &c. C. D.

No. LXII. *Commitment for want of Distress.—From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, pp. 168. 510.*

Middlesex. { To the (constable) of —, in the said
 { county, and to the keeper of the common
 gaol [*or*, the house of correction] at —,
 in the said county.

Whereas A. B. of —, in the said county, yeoman, was, on the — day of — convicted before me, C. D. esquire, one of his Majesty's justices of the peace in and for the said county, upon the oath of E. F. a credible witness, for that he the said A. B. [*here set forth the offence*] contrary to the Statute made in the 13th year of the reign of his Majesty King George the Third, "For the amendment and preservation of the highways," by reason whereof the said A. B. hath forfeited the sum of —: And whereas on the — day of —, in the year aforesaid, I did issue my warrant to the [*constable*] of —, to levy the said sum of — by distress and sale of the goods and chattels of him the said A. B. and to distribute the same according to the directions of the said Statute: And whereas it duly appears to me, upon the oath of the said [*constable*], that the said [*constable*] hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B. as aforesaid, but that no sufficient distress can be had whereon to levy the same; These are therefore to command you, the said [*constable*] of — aforesaid, to apprehend the said A. B. and him safely convey to the common gaol [*or*, house of correction], at —, in the said county, and there deliver him to the keeper thereof, together with this precept: And I do hereby also command you, the said keeper, to receive and keep in your custody the said A. B. for the space of three months, unless the said sum shall be sooner paid, pursuant to the said conviction and warrant; and for so doing this shall be your sufficient

warrant. Given under my hand and seal, the — day of —, in the year of our Lord —.

In the case of a commitment for the want of payment of money due by an assessment, it must be—to receive and keep in your custody, until he shall have paid the said sum of —, and the further sum of —, being the costs and charges occasioned by his neglect in paying the same.

No. LXIII. *Notice of Appeal to the Quarter Sessions. From Schedule to Statute 13 Geo. 3. c. 78.—Vide ante, p. 515.*

A. B. Take notice, that I intend to appeal to the next General Quarter Sessions of the peace, to be holden for the county, &c. of —, against an order [conviction, or other proceeding, as the case may be, particularly specifying the purport of such order, &c. and assigning the grievance, and cause of complaint.] Dated the — day of —.

C. D.



PART II.

FORMS RELATING TO TURNPIKE ROADS (a).

No. LXIV. *Order of trustees for erecting a weighing engine.—From Schedule to Stat. 3 Geo. 4. c. 126. Vide ante, p. 277.*

AT a meeting of the trustees of the turnpike roads, under an Act passed in the — year of the reign of his Majesty King George the —, for [*state the title of the Act,*] held at —, the — day of —. In pursuance of the powers given to us by an Act passed in the 3d year of the reign of his Majesty King George the Fourth, “ For regulating turnpike roads (b), ” we do hereby order that an engine proper for the weighing of carriages of the constructions and weights specified in the said Act be forthwith erected at or as near as conveniently may be to the toll-gate or bar now erected upon the said turnpike road at —; and that A. B. the [*treasurer, clerk, or*] surveyor of the said turnpike road, do contract with some proper person [*or, with C. D. in case the trustees shall think fit to name the person*] for the making and erecting such engine, and do inspect and take care that the same is properly done; And we do order the gate-keeper at the said gate or bar for the time being, to attend the said weighing engine, and carefully to weigh all carriages passing loaded upon the said road, at the place where such

(a) The whole of the Forms contained in this Part of the Appendix are taken from the Statute Book, and should, therefore, be carefully followed in all proceedings. See ante, p. 323.—Wherever the proceeding or offence is provided for by a later Act than that of 3 Geo. 4. c. 126, (which alone is mentioned in these Forms)

such later Act and its title must be substituted for or added to that of 3 Geo. 4. c. 126, as the case may require.

(b) And of an Act passed in the 9th year of the reign of his said Majesty, “ To amend the Acts for regulating turnpike roads.”

engine shall be erected, together with the loading thereof, and to take the several additional tolls or rates for over-weight, and give tickets of the weight of such carriages and loading, when required by the driver thereof, and also to enter in a separate book, to be kept by him for that purpose, an account of every carriage so weighed, which shall, with the loading, exceed the weights allowed by the said Act, and account to us for the money received for all such over-weight.

No. LXV. *Table of weights allowed in winter and summer to carriages directed to be weighed (including the carriage and loading.)—From Sched. to Stat. 4 Geo. 4. c. 95.—Vide ante, p. 272.*

	Summer.		Winter.	
	Tons.	Cwt.	Tons.	Cwt.
For every waggon with 9 inch wheels	6	10	6	0
For every cart with 9 inch wheels	3	10	3	0
For every waggon with 6 inch wheels	4	15	4	5
For every cart with 6 inch wheels	3	0	2	15
For every waggon with wheels of } the breadth of $4\frac{1}{2}$ inches	4	5	3	15
For every cart with wheels of the } breadth of $4\frac{1}{2}$ inches	2	12	2	7
For every waggon with wheels of } less than $4\frac{1}{2}$ inches	3	15	3	5
For every cart with wheels of less } than $4\frac{1}{2}$ inches	1	15	1	10

No. LXVI. *Agreement between trustees of different turnpike roads, for erecting one weighing engine for the use of such roads.—From Sched. to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 280.*

At a meeting of the trustees of the turnpike roads, under an Act passed in the — year of the reign of King George the —, "For" [*state the principal part of the title of the Act*], and also of the trustees of the turnpike roads, under an Act passed in the — year of the reign of King George the —, "For" [*&c. as above*], held at —, the — day of —, for the purpose of agreeing upon and ordering a weighing engine at the joint expence of the trustees, for the use of the said several turnpike roads, pursuant to the powers given by an Act passed in the 3d year of the reign of his Majesty King George the Fourth, "For regulating turnpike roads;" It appearing to us, that a weighing engine may be erected at —, [*describing the spot where it can be most conveniently placed*], which will accommodate both the said turnpike roads, according to the true intent and meaning of the said Act; We do therefore order, &c. [*as in the form above mentioned*], and we do hereby agree and order, that the expences of making and erecting the said weighing engine, and the sum of —, which we do hereby agree and order shall be paid to the toll-gatherer attending the said toll-gate for the time being weekly for his extraordinary trouble in attending the said weighing engine, shall be advanced and paid by the treasurers of the said several turnpike roads, in the shares and proportions following; videlicet, that the treasurer of the — road shall pay [one-half], [two-third], [three-fourth], parts thereof, [*as the trustees shall agree*], and the treasurer of the — road shall pay the remaining [one-half], [one-third], or [one-fourth] part thereof; and that the money to be received at the said weighing engine by forfeitures for over-weight shall be paid to the said respective treasurers in the like proportions, and applied by them for the use of the said respective turnpike roads.

[*Signed.*]

No. LXVII. *Notice of a meeting of trustees, for ordering a side-gate to be erected.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 256.*

Notice is hereby given, that the trustees of the turnpike roads, under an Act passed in the — year of the reign of King George the —, “For” [*state the material parts of the title of the Act*], will meet at the house of —, at —, on the — day of — next, at the hour of —, in the — noon, in order to consult about erecting a toll-gate on the side of the said turnpike road, at or near a place called —, across a certain highway there, leading to —. Dated the — day of —.

A. B. clerk to the said trustees.

No. LXVIII. *Order of the trustees for erecting a side-gate.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 256.*

At a meeting of the trustees of the turnpike roads, under an Act passed in the — year of the reign of King George the —, “For” [*here state the material parts of the title of the Act*], being assembled this — day of —, to enforce the directions of an Act passed in the 3d year of the reign of King George the Fourth, “For regulating turnpike roads,” (as far as the same respects the erecting of side-gates.) In pursuance of public notice given in writing upon all the toll-gates erected on the said road, and also in the — newspapers circulated in this part of the country, for fourteen days now last past, we do order that a toll-gate shall be erected on the side of the said turnpike road, at or near a place called —, across a certain highway there leading to —, and that the following toll be taken at the said gate, videlicet [*here insert the particular tolls to be taken at the said gate.*]

No. LXIX.—*Notice for letting tolls.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 263.*

Notice is hereby given, that the tolls arising at the toll-gate [or, toll-gates, *if more than one*], upon the turnpike road at —, called or known by the name of the — gate, will be let by auction to the best bidder, at the house of —, at —, on the — day of — next, between the hours of — and —, in the manner directed by the Act passed in the 3d year of the reign of his Majesty King George the Fourth, "For regulating turnpike roads," which tolls produced the last year the sum of —, above the expences of collecting them, and will be put up at that sum; whoever happens to be the best bidder, must at the same time pay one month in advance (if required) of the rent at which such tolls may be let, and give security, with sufficient sureties, to the satisfaction of the trustees of the said turnpike road, for payment of the rest of the money monthly [*or in such other proportions as shall be directed*].

A. B. clerk to the
trustees of the said turnpike road.

No. LXX. *Order of trustees for reducing the tolls.—From Schedule to Statute 3 Geo. 4. c. 126.—Vide ante, p. 254.*

At a meeting of the trustees of the turnpike roads, under an Act passed in the — year of the reign of King George the —, "For," &c. [*state the principal part of the title of the Act*], held at —, the — day of —.

We, whose names are subscribed, being — or more of the trustees acting under the said Act, being now assembled for reducing the tolls authorized to be taken by and under the said Act, pursuant to public notice given for that purpose in the — newspapers circulated in this part of the country, and also affixed upon all the turnpike gates erected upon the said turnpike road, for

upwards of one calendar month now last past, and having the consent of the several persons entitled to five-sixth parts of the money now remaining due upon the credit of the said tolls, this day signified and proved to us, do hereby order, that the tolls granted by the said Act shall, from and after the — day of —, be lessened and reduced in the following manner [*here state the several reductions proposed to be made*].

LXXI. *Agreement between the trustees of a turnpike road and a person liable by tenure to repair some part of it.—From Schedule to Statute 3 Geo. 4. c. 126.—Vide ante, p. 250.*

At a meeting of the trustees of the turnpike roads, under an Act passed in the — year of the reign of King George the —, “For” [*state the principal part of the title of the Act;*] held at —, the — day of —. Whereas A. B. of — is liable by tenure, &c. [*as the case shall be,*] to the repair of a certain highway leading between — and —, of the length of — yards or thereabouts; and the said highway being now made turnpike road by virtue of the said Act, will occasion a greater expence to make and keep the same in proper repair than would have been necessary if no such Act had been obtained, and the said A. B. attending this meeting in person [*or, by C. D. his attorney or agent authorized to treat in his behalf,*] the said trustees and the said A. B., &c. in pursuance of a power given by an Act passed in the 3d year of the reign of King George the Fourth, “For regulating turnpike roads,” have, in order to put and keep the said road in proper condition and repair, come to the following agreement; videlicet, that the said trustees shall, on or before the — day of — next, pay and allow the sum of — out of the tolls arising upon the said turnpike roads towards putting the said road into proper repair, to be laid out and expended by the surveyor of the said turnpike road, and that the said A. B. shall advance and pay into the hands of the treasurer of the said turnpike road on or before the — day of — next, the sum of —, to be also laid out and expended by the said surveyor in the repair of the said road, and that from and after the — next, the said turnpike road

shall be kept in repair by the said trustees out of the said tolls as aforesaid, so long as the said Turnpike Act shall continue, upon the said A. B. paying into the hands of their treasurer the sum of —, upon the — in every year, which the said A. B. doth hereby for himself and his heirs agree to pay accordingly so long as the said road shall be so repaired by the said trustees as aforesaid.

[Or, if it shall be agreed that A. B. shall keep the road in repair upon having an annual allowance in money or statute duty from the said trustees, let the agreement be varied and adapted to the case].

LXXII. Magistrates' Summons.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 244.

To the surveyors of the highways of the parish of —, in the county of —.

Upon application made by —, surveyor of the turnpike roads from —, appointed by the trustees for putting into execution an Act of Parliament passed in the — year of the reign of his Majesty King George the —, intituled, "An Act," &c. by order of the trustees for the said road to us, two of his Majesty's justices of the peace acting in and for the said county; we do hereby summon you, the surveyors of the highways of the parish or place of —, in the said county, to deliver a list to the said —, as such surveyor as aforesaid, at his house, situate in the said county, within — days after the service of this summons, of the names of the several persons, inhabitants of the said parish or place, and who are by law subject and liable to do statute work for the present year upon the road situate in the said parish or place, or to the payment of any money in lieu of or as a composition for such statute work, distinguishing the nature of the work to be done, whether with teams or draughts or otherwise, and also the amount of the respective sums to be paid; and we the said justices do hereby require you to make such lists of names, in such manner and under such regulations and restrictions as is or are directed by any law or statute now in force and effect for the repair of the public highways.

And in case you shall refuse or wilfully neglect to give in such list as aforesaid, or shall knowingly or wilfully give in a false or imperfect list, you so offending will, for every such offence, forfeit and be liable to pay a sum not exceeding £10. Given under our hands and seals, this — day of —.

No. LXXIII. *Notice to be given to surveyors of highways.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 245.*

To the surveyors of the highways of the parish or place of —, in the county of —.

I do hereby give you notice, that the list delivered by you to me as surveyor of the turnpike road from — to —, in the said county of —, of the names of the several persons who within your said parish or place are by law liable to do statute work for the present year, or to the payment of money in lieu of or as a composition for such statute work, will be laid before two of his Majesty's justices of the peace for the said county, in pursuance of the directions of the Act passed in the — year of his Majesty King George the —, intituled, "An Act," &c. on the — day of —, at —, in the said county, in order that such two justices may adjudge and determine what part or proportion of the statute work for the said year shall be done upon the said road, and also what proportion of the composition-money shall be paid to the trustees of the said road, or to their treasurer. And I do hereby give you further notice, that I shall apply to the justices for [*one-half, one-third, as the case may be,*] of the statute duty from your parish for this year, which according to the list delivered by you will be (say) — days in the whole — in composition-money. If you object to this division, you will in course appear, but if not, the same will be confirmed by the justices, if they think proper. Dated this — day of —, —.

— Surveyor of the said turnpike road.

No. LXXIV. *Justices' order, apportioning statute labour and composition.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 245.*

_____ } We, two of his Majesty's justices of the
to wit. } peace acting in and for the county of _____,
upon application by _____, the surveyor appointed by the
trustees of the turnpike road from _____ to _____ in the
said county, in pursuance of an Act of Parliament, passed
in the _____ year of the reign of his Majesty King George
the _____, intituled, "An Act for _____," do adjudge and
determine that the inhabitants of the parish of _____, in
the said county of _____, shall do _____ part or proportion of
the statute work for the ensuing year upon such turnpike
road in the said parish of _____, being a parish in which
the said road lies, and that _____ proportion of the money
received by the surveyor or surveyors of the highways of
such parish or place, in lieu of or as a composition for
such statute work, shall be by him or them paid to the
said trustees of the said turnpike road, or to their trea-
surer, or other person authorized by them to receive the
same, on or before the _____ day of _____; the names of
the several persons appointed to do such proportion of
the statute work on the said turnpike road appear in the
Schedule to this order. Given under our hands, the _____
day of _____.

[Signed.]

No. LXXV. *Order of justices at a Special Sessions, to take part of the statute duty from turnpike roads, for the benefit of other highways in the said parish, &c.—From Schedule to Statute 3 Geo. 4. c. 126.—Vide ante, p. 249.*

County of _____ } At a Special Sessions held by the justices of
to wit. } peace for the said county, acting in the
[hundred] of _____, within the said county,
at _____, on the _____ day of _____.

Whereas application and complaint upon oath has been made unto us by A. B., surveyor of the [parish, &c.] of _____, that the several highways, not being turnpike,

with the said [*parish, &c.*] are very extensive and in bad repair, and that a considerable part of the statute duty arising within the said [*parish, &c.*] hath been called forth and required to be applied in the repair of certain turnpike roads lying within the said [*parish, &c.*] which are in good condition, and have a considerable revenue for their support, arising from the tolls collected thereupon; and we having duly summoned C. D., the surveyor of the said turnpike road, to appear before us to show cause why the said statute duty called forth and applied by him to the repair of the said turnpike road, should not be withdrawn therefrom and applied to the repair of the other highways within the said [*parish, &c.*] and upon hearing the said C. D., and receiving an account of the revenues and debts of the said turnpike road, and of the state and condition of the repair of the said turnpike road and highway respectively; and it appearing to us, upon full consideration had thereupon, that part of the statute duty hitherto employed by the said [*parish, &c.*] for the repair of the said turnpike road may be conveniently dispensed, without endangering the securities for the money advanced upon the credit of the tolls thereof, and that such statute duty is wanted for the repairs of the other highways within the said parish; We, in pursuance of the power given to us by the Act passed in the 3d year of the reign of King George the Fourth, "For regulating turnpike roads," do order, that from and after the — day of — next, there shall be only [one] day's statute duty performed by the inhabitants of the said [*parish, &c.*] upon the said turnpike road within the same, and that the remainder of the statute duty shall be performed upon the other highways within the said [*parish, &c.*]

[*If there are more turnpike roads than one, or the whole statute duty shall be thought fit to be taken away, this form must be varied to fit those cases; the summons to the surveyors will be very easily formed from this order.*]

No. LXXVI. *Certificate of the above order to the justices of the peace at their Quarter Sessions.—From Schedule to Statute 3 Geo. 4. c. 126.—Vide ante, p. 249.*

I, A. B., clerk to the trustees mentioned in the above order, do hereby certify to the justices of the peace for the [county] [riding] [division] of—, at their General Quarter Sessions of the peace, that the above is a true copy of the order made by the said trustees (a) for the purposes therein mentioned. Dated this — day of —.

A. B.

No. LXXVII. *Agreement by subscription for advancing money to make and repair a turnpike road or highway.—From Schedule to Statute 3 Geo. 4. c. 126.—Vide ante, p. 306.*

We, whose names are subscribed, do agree to advance and pay the several sums written by us opposite to our names, unto —, to be laid out and expended in the making and repairing a certain highway leading from — to —, after an Act of Parliament shall be obtained for making the same turnpike road, upon having the tolls to be collected upon such turnpike road assigned and made over to us as a security, for the respective sums so to be advanced by us, together with interest for the same after the rate of — *per centum per annum*; which sums we do hereby severally agree to pay by instalments in the following manner, viz. one-fourth part thereof on the — day of — next, one other fourth part [&c., &c., &c.] Dated this — day of —.

(a) Sic.

No. LXXVIII. *Warrant from a justice of the peace to enter the toll-gate house and remove the persons therein.—From Schedule to Stat. 3 Geo. 4. c. 126. Vide ante, p. 224.*

County of } To the [constable, headborough, or tithing-
 ————— } man,] of —, in the said county.
 to wit.

Whereas complaint hath been made unto me A. B. esq., one of his Majesty's justices of the peace for the said county, upon the oath of —, and other evidence now produced to me, that C. D., who now inhabits the turnpike or toll-gate house at —, upon the turnpike road leading from — to —, and was appointed to collect the tolls there, hath been duly discharged by the trustees of the said turnpike road, from any further collecting or receiving the tolls arising at the said gate, and hath refused, and still doth refuse to quit the possession of the said house; and the said C. D. having been summoned to appear before me this day, to show cause why he should not be removed from the said house, and having shown no sufficient cause for that purpose [or, not having appeared,] I do hereby authorize and require you, with such assistance as shall be necessary, to enter into the said toll-house or turnpike-house, and the buildings belonging thereto, in the day-time, and to remove the said C. D. and all such persons as shall be found therein, together with his and their goods, out of such house and buildings, and to put E. F., the person lately appointed by the trustees to collect such tolls, into the possession thereof, for which this shall be your sufficient warrant. Given under my hand and seal, this — day of —.

[*This form may be varied to suit the case of the widow or family of a deceased collector.*]

No. LXXIX. *Bond from the surveyor.—From Sched. to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 223.*

We, A. B., surveyor of the turnpike roads, under an Act passed in the — year of the reign of King George

the —, "For," [*state the principal part of the title of the Act,*] and C. D., of —, are bound to E. F., of —, in the sum of — pounds, to be paid to the said E. F., his executors, administrators, and assigns, for which payment we hereby bind ourselves severally, and each of our heirs, executors, and administrators. Dated the — day of —.

The condition of this bond is such, that if the said A. B., his executors or administrators, shall duly and faithfully account for, apply, and pay all and every the sum and sums of money which hath come or shall come to his hands as surveyor of the turnpike road aforesaid, according to the direction and true intent and meaning of the said Act, and of the Statute made in the 3d year of the reign of his Majesty King George the Fourth, "For regulating turnpike roads," then this bond to be void, or else to remain in full force.

[*The bond from the treasurer will be in the same form.*]

No. LXXX. *Summons for any person or persons to attend a justice or justices.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, pp. 290. 455.*

County of }
 _____ } To A. B. of —.
 to wit. }

Whereas complaint and information hath been made before me, C. D., one of his Majesty's justices of the peace for the said [*county, &c.*] by E. F., of —, that, &c. [*here state the nature and circumstances of the case, as far as it shall be necessary to show the offence, and to bring it within the authority of the justice, and in doing that, follow the words of the Act, as near as may be;*] these are therefore to require you personally to appear before me [*or, the justices to be assembled at their Special Sessions, to be holden*] at —, in the said [*county, &c.*] on the — day of — next, at the hour of —, in the — noon, to answer to the said complaint and information made by the said E. F., who is likewise directed to be then and there present, to make good the same. Herein fail not. Given under my hand, this — day of —.

No. LXXXI. *Information.*—*From Schedule to Stat.*
3 Geo. 4. c. 126.—*Vide ante*, pp. 230. 232. 545.

County of } Be it remembered, that on the — day of
—, A. B. of —, in the said county, in-
to wit. } formeth me —, one of his Majesty's justices
of the peace for the said county, that — of —, in
the said county [*here describe the offence, with the time,
and place, and follow the words of the Act as near as
may be,*] contrary to the Statute made in the 3d year of
the reign of King George the Fourth, "For regulating
turnpike roads," which hath imposed a forfeiture of —
for the said offence.

Taken the — day of —, before me,

A. B.

No. LXXXII. *Form of conviction.*—*From Schedule
to Stat.* 3 Geo. 4. c. 126.—*Vide ante*, p. 545.

County of } Be it remembered, that on the — day
— of —, in the — year of the reign of —,
to wit. } and in the year of our Lord —, A. B. is
convicted before me —, one of his Majesty's justices
of the peace for the said county, for [*here specify the
offence, and when and where committed (a),*] contrary to
the form of the Statute made in the — year of the reign
of —, intituled, [*here set forth the title of the Act (b);*]
and I do hereby declare and adjudge that the said A. B.
hath forfeited, for the said offence, the sum of — [*or,
shall be committed to — for the space of —, as the
case may be.*] Given under my hand and seal, the day
and year first above written.

C. D.

(a) In specifying the offence, it is necessary to state the place and county in which it was committed, in order to give the magistrate jurisdiction, by shewing it within the county for which he

acts. *Rex v. Hazell*, 13 East, 139, and *Kite and Lane's Case*, 1 B. & C. 101.

(b) This must be correctly set forth, *Mills v. Wilkins*, 2 Salk. 609.

No. LXXXIII. *Warrant to distrain for forfeiture (a).*
From Schedule to Statute 3 Geo. 4. c. 126.—Vide
ante, pp. 230. 545.

To the [constable, headborough, or, tithingman,]
 of —.

County of } Whereas A. B. of —, in the said county,
 — } is this day convicted before me C. D. esquire,
 to wit. } one of his Majesty's justices of the peace in
 and for the said county, upon the oath of G. H., a cre-
 dible witness, for that the said A. B. hath [*here set forth*
the offence, describing it particularly in the words of the
Statute, as near as may be,] (contrary to the Statute in
 that case made and provided,) by reason whereof the
 said A. B. hath forfeited the sum of —, to be distributed
 as herein is mentioned, which he hath refused to pay;
 these are therefore in his Majesty's name to command you
 to levy the said sum of —, by distress of the goods
 and chattels of him the said A. B.; and if within the
 space of four days next after such distress by you taken,
 the said sum, together with the reasonable charges of
 taking and keeping the same, shall not be paid, that then
 you do sell the said goods and chattels so by you dis-
 trained, and out of the money arising by such sale, that
 you do pay one-half of the said sum of — to E. F. of
 —, who informed me of the said offence, and the other
 half of the said sum of — to I. K., the surveyor of the
 turnpike road [*describing it*] where the said offence
 [*neglect or default*] happened, to be employed towards
 the repair of the said road, returning the overplus, on
 demand, to him the said A. B. (the reasonable charges of
 taking, keeping, and selling the said distress being first
 deducted;) and if sufficient distress cannot be found of
 the goods and chattels of the said A. B. whereon to levy
 the said sum of —, that then you certify the same to
 me, together with this warrant, Given under my hand
 and seal, the — day of —.

(a) This must be directed to the proper officer, and executed within
 his district.

No. LXXXIV. *Return of the constable, to be made upon the warrant of distress, where there are no effects.—From Schedule to Stat. 3 Geo. 4. c. 126. Vide ante, pp. 230. 545.*

I, A. B., constable of the [*parish, &c.*] of —, in the county of —, do hereby certify and make oath, that by virtue of this warrant, I have made diligent search for the goods of the within-named —, and that I can find no sufficient goods whereon to levy the within sum of —. As witness my hand, the — day of —.

A. B.

Sworn before me, the
day and year, &c.

C. D.

No. LXXXV. *Commitment for want of distress.—From Schedule to Statute 3 Geo. 4. c. 126.—Vide ante, pp. 231. 545.*

County of } To the constable of —, in the said county,
_____ } and to the keeper of the common gaol [*or,*
to wit. } the house of correction] at —, in the
said county.

Whereas A. B. of —, in the said county, was, on the — day of —, convicted before me, C. D. esquire, one of his Majesty's justices of the peace in and for the said county, upon the oath of E. F. a credible witness, for that he the said A. B. [*here set forth the offence,*] contrary to the Statute made in the 3d year of the reign of his Majesty King George the Fourth, "For regulating turnpike roads;" by reason whereof the said A. B. hath forfeited the sum of —: And whereas, on the — day of —, in the year aforesaid, I did issue my warrant to the [*constable*] of —, to levy the said sum of — by distress and sale of the goods and chattels of him the said A. B., and to distribute the same according to the directions of the said Statute: And whereas it duly appears to me, upon the oath of the said [*constable*], that the said [*constable*] hath used his best endeavours to levy the said sum on the goods and chattels

of the said A. B. as aforesaid, but that no sufficient distress can be had whereon to levy the same; these are therefore to command you, the said [constable] of — aforesaid, to apprehend the said A. B. and him safely to convey to the common gaol [or, house of correction] at —, in the said county, and there deliver him to the keeper thereof, together with this precept; and I do also command you the said keeper, to receive and keep in your custody the said A. B. for the space of three months, unless the said sum shall be sooner paid, pursuant to the said conviction and warrant; and for so doing, this shall be your sufficient warrant. Given under my hand and seal, the — day of —, in the year of our Lord —.

C. D.

No. LXXXVI. *Notice of appeal to the Quarter Sessions.—From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 551.*

A. B. Take notice, that I intend to appeal to the next General Quarter Sessions of the Peace to be holden for the [county, &c.] of —, against an order [conviction, or other proceeding as the case may be] [particularly specifying the purport of such order, &c. and assigning the grievance, and cause of complaint.] Dated the — day of —.

C. D.

No. LXXXVII. *General Statement of Income and Expenditure, and of Debts and Credits.*
From Schedule to Stat. 3 Geo. 4. c. 126.—Vide ante, p. 204.

GENERAL STATEMENT of the income and expenditure of the [insert the name of the particular road,]
between the — day of — and the — day of —.

EXPENDITURE.		£	s.	d.
To surveyor's account of day labour, between the — day of — and the — day of —, for maintenance or repair of roads				
To surveyor's account of team-labour, between the — day of — and the — day of —				
To surveyor's account for work executed by contract, specifying the amount done and the rate of contract paid				
To surveyor's accounts for repair, or maintenance, or building of houses, gates, or bridges				
To surveyor's account for land purchased, or for damages done				
To surveyor's account for rent of quarries				
To salaries and other payments of clerks, surveyors, or other officers				
To printing, advertising, and stationery				
To interest of debt				
To incidental charges				
				£
INCOME.		£	s.	d.
By balance in treasurer's hands				
By amount of rents received from the lessees, or tolls received from the gate-keepers, between the — day of — and the — day of —, as follows :—[here specify the respective gates, and the different amounts received.]				
By amount of statute labour, between the — day of — and the — day of —, as follows :—[here specify the amount paid by each parish, hamlet, township, or place.]				
By amount of money borrowed on security of tolls [if any.]				
By incidental receipts				
				£
GENERAL STATEMENT OF DEBTS AND CREDITS.				
		£	s.	d.
An account of the amount of debt bearing interest				
An account of interest due				
An account of floating debt				
				£
		£	s.	d.
Arrears of rents [or, tolls] due, not received, as under. [Insert the names of the lessees [or, of gates,] and when due. Also insert any other monies due to the trust on any other account.]				
				£

No. LXXXVIII. *List of Persons liable to Statute Work or Composition.—From Schedule to Stat. 4 Geo. 4. c. 95.—Vide ante, p. 244.*

32

A LIST containing the names of all persons in the parish or place of —, in the —, who are liable to do statute work, and to the payment of composition in lieu thereof, for the year commencing from —.

[Signed]

Surveyors of the said parish or place.

1.	2.	3.	4.	5.	6.	7.
Names of persons liable.	No. of horses kept.	Full annual value.	Rate of composition.	Total amount liable in money.	No. of days' duty work.	General observations.
		£ s. d.				

PART III.

FORMS RELATING TO PUBLIC BRIDGES.

No. LXXXIX. *Order of two justices, to repair a county bridge.—From Schedule to Stat. 52 Geo. 3. c. 110.—Vide ante, p. 358.*

County of } To —, of the parish of —, in the said
 — } county.

WE, — and —, two of his Majesty's justices of the peace in and for the said county, duly appointed, in pursuance of the Statute in that case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof as by law is to be repaired at the expence of the said county, within the division or hundred of —, in the said county, having on this day inspected the county bridge —, situate in the parish of —, in the said county, and within the said division or hundred; and it appearing to us, on our own inspection thereof, to be necessary for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same, as in the schedule of particulars by you prepared and signed, and hereto annexed:—Now therefore, we, the said justices, do hereby order and direct you, immediately to repair and amend the said county bridge, according to the said schedule of particulars by you prepared and signed, and hereto annexed, provided that the sum to be expended in such repairs shall not exceed the sum of —. Given under our hands, this — day of —, 18—.

No. XC. *Certificate of such repair, to be returned to the Sessions.—From Schedule to Stat. 52 Geo. 3. c. 110.—Vide ante, p. 359.*

County of } To the justices of the peace at the General
 _____ } Quarter Sessions to be holden at _____, in
 to wit. } the said county, the _____ day of _____, 18—.

We, _____ and _____, two of his Majesty's justices of the peace in and for the said county, duly appointed, in pursuance of the Statute in that case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof as by law is to be repaired at the expence of the said county, within the division or hundred of _____, in the said county, do hereby certify to the said Court of Quarter Sessions, that on the _____ day of _____ last, we did inspect the county bridge _____, situate in the parish of _____, in the said county, and within the division aforesaid; and it having appeared to us, on our own inspection thereof, that _____, and that it was necessary for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same, as follows; viz. _____; therefore we, the said justices, did on the said _____ day of _____, make our order, in writing, signed with our respective hands, and did thereby order and direct _____ of the parish of _____, in the said county of _____, immediately to make the said repairs and amendments, provided that the sum to be expended in such repairs should not exceed the sum of _____ pounds: And we, the said justices, do hereby further certify, that the said repairs so directed to be made as aforesaid, have been made accordingly by the said _____, and that the reasonable price and charges payable to the said _____ for the same, amounts to the sum of _____, as *per* account hereto annexed, and verified on the oath of _____. Given under our hands, this _____ day of _____, in the year of our Lord 18—.

No. XCI. *Indictment of a bridge out of repair.*
Vide ante, p. 366.

County of } By the oath of — good and lawful men
 — } of the county of — aforesaid, then and
 there sworn and charged to inquire for our Lord the
 King and the body of the county aforesaid, it is pre-
 sented, that a certain common bridge over the river —,
 commonly called — bridge, lying and being in the
 parish of —, in the county aforesaid, in the king's
 common highway there, leading from the market-town
 of —, to the market-town of —, in the said county,
 altogether and from the time whereof the memory of man
 is not to the contrary, being a common king's highway
 for all the lieges and subjects of our said Lord the King
 and of his ancestors, with their horses, carts, and car-
 riages to go, pass, ride, and travel at their pleasure, on
 the — day of —, in the — year of the reign
 of —, was and yet is in great decay, broken, and ruin-
 ous, so that the lieges and subjects of our said Lord the
 King, upon and over the said bridge, with their horses,
 carts, and carriages, could not, and cannot go, pass, ride,
 and travel, without great danger, to the grievous damage
 and nuisance of all the lieges and subjects of our said
 Lord the King, upon and over the same bridge going,
 passing, riding, and travelling, and against the peace of
 our said Lord the King, his crown and dignity. And
 that the inhabitants of the county aforesaid, the common
 bridge aforesaid (so as aforesaid being in decay) ought
 to repair and amend, when and so often as it shall be
 necessary.

[Or,—And that A. O. late of —, in the said county,
 gentleman, by reason of his tenure of certain lands lying
 in the parish of — aforesaid, ought to make, repair,
 and amend the said common bridge, as often as and
 when it shall be necessary.]

PART IV.

THE TITLES OF THE SEVERAL ACTS OF PARLIAMENT NOW
IN FORCE, RELATING TO HIGHWAYS AND TURNPIKE
ROADS (a).

I. *Acts of Parliament relating to Highways.*

1st.—Stat. 13 GEO. 3. c. 78.

An Act to explain, amend, and reduce into one Act of Parliament, the Statutes now in being for the amendment and preservation of the public highways within that part of Great Britain called England, and for other purposes.

[1773.]

2d.—Stat. 34 GEO. 3. c. 64.

An Act for the more effectually repairing of such parts of the highways of this kingdom, as are to be repaired by two parishes.

[23d May, 1794.]

3d.—Stat. 34 GEO. 3. c. 74.

An Act for varying some of the provisions in an Act of the 13th year of his present Majesty's reign, respecting the public highways within that part of Great Britain called England, which relate to the performance of statute duty.

[11th June, 1794.]

(a) It is thought convenient to add these titles, as they are fre-

quently to be inserted in proceedings under the several Acts.

4th.—Stat. 44 GEO. 3. c. 52.

An Act to alter and amend so much of an Act passed in the 34th year of his present Majesty, as relates to the amount of the sums to be paid by persons compounding for the performance of statute duty.

[16th May, 1804.]

5th.—Stat. 54 GEO. 3. c. 109.

An Act to amend an Act of the 13th year of his present Majesty, to explain, amend, and reduce into one Act, the Statutes now in force for the amendment and preservation of the public highways within England, and for other purposes.

[23d July, 1814.]

6th.—Stat. 55 GEO. 3. c. 68.

An Act to amend an Act of the 13th year of his present Majesty, for the amendment and preservation of the public highways, in so far as the same relates to notice of appeal against turning or diverting a public highway, and to extend the provisions of the same Act to the stopping up of unnecessary roads.

[7th June, 1815.]

II. *Acts of Parliament relating to Turnpike Roads.*

1st.—Stat. 3 GEO. 4. c. 126.

An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England.

[6th Aug. 1822.]

2d.—Stat. 4 GEO. 4. c. 16.

An Act to explain so much of the General Turnpike Act, as relates to the toll payable on carriages laden with lime for the improvement of land.

[24th March, 1823.]

3d.—Stat. 4 GEO. 4. c. 35.

An Act to enable trustees or commissioners under Acts of Parliament, to meet and carry such Acts into execution, although they may not have met according to the directions of such Acts.

[*27th June, 1823.*]

4th.—Stat. 4 GEO. 4. c. 95.

An Act to explain and amend an Act passed in the 3d year of the reign of his present Majesty, to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England.

[*19th July, 1823.*]

5th.—Stat. 5 GEO. 4. c. 69.

An Act to enable justices of the peace for ridings, divisions, or sokeas, to act as trustees for repairing and maintaining turnpike roads.

[*17th June, 1824.*]

6th.—Stat. 7 & 8 GEO. 4. c. 24.

An Act to amend the Acts for regulating turnpike roads in England.

[*14th June, 1827.*]

7th.—Stat. 9 GEO. 4. c. 77.

An Act to amend the Acts for regulating turnpike roads.

[*25th July, 1828.*]

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